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SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

October Term, 1957

No. [redacted] 24

JOSEPH KERMAREC, PETITIONER,

v.

COMPAGNIE GENERALE TRANSATLANTIQUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petition for Certiorari Filed September 23, 1957
Certiorari Granted December 16, 1957

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 669

JOSEPH KERMAREC, PETITIONER,

vs.

COMPAGNIE GENERALE TRANSATLANTIQUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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A (File Endorsement Omitted)

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. 52-114

JOSEPH KERMAREC

vs.

COMPAGNIE GENERALE TRANSATLANTIQUE

Basis of Action: Personal Injuries

Jury Trial Claimed:

On 9-12-49 by pltf. and on 9-30-49 by deft.

For Plaintiff:

Louis M. Volan, 76 Beaver St. N Y C

For Defendant:

George A. Garvey, 99 John St. (7)

B **Docket Entries**

Sep. 12, 1949—Filed Complaint and Issued Summons.
Sep. 16, 1949—Filed Summons & Return—Served Charles DiMara, Asst. Claim Agent for deft. on 9-13-49.
Sep. 30, 1949—Filed Jury demand by deft.
Sep. 30, 1949—Filed Answer of Deft. G A G
Apr. 16, 1953—Pre-trial before Goddard J. Order to enter.
May 20-53—Filed Transcript of Record of Proceedings of Apr. 16-53.
Aug. 19-53—Filed Affdvt. & Notice of Motion for inspection—Ret. 9-8-53.
Oct. 8-53—Filed Pre-Trial order—Goddard, J.
Oct. 6-53—Filed Affdvt. in opp. to discovery and inspection.
Oct. 29-53—Filed Order for photographing, etc., Weinfeld, J. Mailed Notice of Entry 10-30-53.
Apr. 14-54—Filed Affdvt. for adjournment.
Apr. 4-55—Filed Affdvt. for adjournment.
May 10-55—Filed Affdvt. of engagement.
May 18-55—Before Murphy, J.—Trial begun.
May 19-55—Before Murphy, J.—Trial continued.

May 20-55—Before Murphy, J.—Trial continued and concluded. Verdict of Jury: Disagreement. Jury discharged.

May 31-55—Filed Notice to set case down for trial—Memo. End. (dated 5-26-55) Granted. Put case at head of Day Cal. for 6-14-55 for actual trial, Bondy, J.

June 17-55—Filed Transcript of Record of Proceedings of May 18, 19, 20, 1955.

Aug. 29, 1955—Filed Notice of Readiness for Trial.

Aug. 31, 1955—Filed Notice of Readiness for Trial.

Oct. 3-55—Before Murphy, J.—Trial begun.

Oct. 4-55—Before Murphy, J.—Trial continued. Verdict of Jury for pltf. $7,500.—Decision on motion to set aside verdict by deft. Reserved.

Nov. 18-55—Filed Memorandum Opinion #22,231 and Judgment granting motion to set aside jury verdict and to dismiss, and dismissing complaint. This is an order, no settlement necessary, Murphy, J. Mailed Notice of Entry 11-18-55.

Dec. 14-55—Filed Notice of Appeal and on 12-15-55 mailed copy to George A. Garvey.

Dec. 30-55—Filed transcript of record of proceedings of Oct. 4-55.

Apr. 20-56—Filed Pltf's Requests to Charge.

May 28-56—Filed transcript of record of proceedings of 10-3-4-1955.

July 12-56—Filed Notice of Motion to include issues, as indicated, at trial.

C IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-(Title Omitted)

Complaint—Filed September 12, 1949

Plaintiff, complaining of the defendant, by Louis M. Volan, his attorney, respectfully alleges and shows to this Court:

First: That at and during all the dates and times hereinafter mentioned, defendant was and still is a French Corporation, having an office and place of business in the City of New York and engaged in the shipping business, and

Plaintiff was and is a citizen and resident of the City and State of New York.

SECOND: That at and during all the dates and times hereinafter mentioned, the defendant owned the S/S OREGON.

THIRD: That at and during all the dates and times hereinafter mentioned, the defendant operated and controlled the S/S OREGON.

FOURTH: That at and during all the dates and times hereinafter mentioned, the plaintiff was lawfully on the S/S OREGON with the knowledge, permission and consent of the defendant.

FIFTH: That prior to the institution of this action, a claim was filed in writing with the defendant on behalf of the plaintiff for personal injuries sustained by the plaintiff on or about the 24th day of November, 1948 on board the S/S OREGON.

D SIXTH: That on or about the 24th day of November, 1948, while plaintiff was lawfully on board the S/S OREGON, suddenly and without any fault on his part and wholly and solely through the recklessness, carelessness and negligence of the defendant, its agents, servants and employees and due to the unseaworthiness of the vessel and its equipment, and defendant's failure to provide the plaintiff with a safe means of ingress and egress to and from the various parts of the vessel, and due to the defendant's fault in permitting a trap to be created on the vessel, plaintiff was caused to trip and fall on the stairway on said vessel, as a result of which he was severely and permanently injured.

The defendant, its agents, servants and employees were reckless, careless and negligent in causing, permitting and allowing the said stairway to be and remain in a dangerous condition and in an unseaworthy condition and in a defective condition and was further negligent in permitting tarpaulin or canvas to be and remain upon said stairway in an unsafe, dangerous and unseaworthy condition and said defendant, its agents, servants and employees were reckless, careless and negligent in failing to warn the plaintiff of this condition; and in failing to take precautions to avoid injury to the plaintiff, all of which resulted in injuries to the plaintiff.

SEVENTH: That the defendant failed to furnish to the plaintiff a seaworthy vessel and was further negligent in failing to advise the plaintiff of hidden dangers, all of which the defendant had due and timely notice thereof and had failed to remedy and rectify said conditions.

EIGHTH: That by reason of the premises aforesaid, plaintiff was injured, bruised and wounded, so that he became, sick, sore, lamed and disabled and was, upon information and belief, permanently injured and so remains, and was internally and externally injured, and was and for a long time will be prevented from attending to his daily occupation, thereby losing large sums of money which he otherwise would have earned as wages, and has expended and will continue to expend large sums of money in endeavoring to be cured of his injuries aforesaid, and has endured and will continue to endure great pain and suffering, all to his damage in the sum of One Hundred Thousand ($100,000.) Dollars.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of One Hundred Thousand ($100,000.) Dollars, together with the costs and disbursements of this action.

/s/ LOUIS M. VOLAN
Attorney for Plaintiff
Office & P.O. Address
76 Beaver Street
Borough of Manhattan
City of New York

H IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title Omitted)

Answer—Filed September 30, 1949

The defendant, as above named, by GEORGE A. GARVEY, its attorney, answering the complaint of the plaintiff herein, alleges:

FIRST: This defendant denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph designated "FIRST" of plaintiff's complaint, except admits that at the times mentioned, defendant was and still is a French Corporation, having an office and place of business in the City of New York and engaged in the shipping business.

SECOND: Upon information and belief this defendant denies each and every allegation contained in paragraph designated "FOURTH" of plaintiff's complaint, except admits that at the times mentioned, the plaintiff was on the S/S OREGON with the knowledge, permission and consent of the defendant.

THIRD: Upon information and belief this defendant denies each and every allegation contained in paragraphs designated "FIFTH", "SIXTH", "SEVENTH" and "EIGHTH" of plaintiff's complaint.

FOURTH: Answering the unnumbered paragraph between paragraphs designated "SIXTH" and "SEVENTH" of plaintiff's complaint, upon information and belief this defendant denies each and every allegation contained therein.

I As and for a First, Separate and Distinct Defense to the Cause of Action Alleged Herein, the Defendant Alleges:

FIFTH: That on or about the 24th day of November 1948, the defendant and the plaintiff entered into an agreement in consideration of the issuance of a visitors pass to the plaintiff to visit the S/S OREGON. The plaintiff agreed as follows:

> "The person accepting this pass in consideration thereof assumes all risks of accidents, and expressly agrees that the Compagnie Generale Transatlantique shall not be held liable under any circumstances whether by negligence of their employees, or other-

wise, for any injury to his person, or for any loss or injury to his property."

WHEREFORE, this defendant demands judgment dismissing the complaint herein, with costs.

/s/ GEORGE A. GARVEY
Attorney for Defendant
Office & P.O. Address
99 John Street
Borough of Manhattan
New York 7, New York

1 IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civ. 52-114

JOSEPH KERMAREC, *Plaintiff*,

vs.

COMPAGNIE GENERALE TRANSATLANTIQUE, *Defendant*.

Transcript of Proceedings—October 3 and 4, 1955

Before:

HON. THOMAS F. MURPHY, D. J., and a jury.

New York,
11.00 o'clock a.m.

APPEARANCES:

LOUIS M. VOLAN, ESQ., Attorney for Plaintiff;

By WILLIAM L. STANDARD, ESQ.,
MALCOLM B. ROSOW, ESQ., of Counsel.

GEORGE A. GARVEY, ESQ., Attorney for Defendant.

(A jury was duly empaneled and sworn.)

---

2 JOSEPH KERMAREC, the plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Rosow:

. . . . . .

Q. How old are you, Mr. Kermarec? A. 67.

Q. Are you presently employed? A. No, I am not.

Q. What is your source of income at this time? A. Social Security.

Q. Who was your last employer, Mr. Kermarec? A. Commodore Hotel.

Q. What was your job there? A. Elevator mechanic.

Q. How long before leaving their employ did you work for that company? A. I worked over 20 years.

Q. Now let me, Mr. Kermarec, direct your attention to November 24, 1948, and ask you if on that day you had occasion to go aboard the French Line vessel, the Oregon? A. Yes, I went to it.

. . . . . .

Q. Will you tell us, sir, how you happened to go to the Oregon? A. I had a friend of mine that wrote to me and he was telling me he needed some coffee and oatmeal.

Q. And these were things that he wanted you to send to him? A. That's right.

Q. And how were you going to send these packages to him, sir? A. Through the Oregon.

Q. And how would you deliver them through the Oregon? A. Mr. Henry was going to deliver them.

Q. Will you tell us who Mr. Henry is? A. He is a brother.

Q. Would you call him a male nurse? A. A male nurse.

Q. And was he employed on the Oregon? A. He was employed on the Oregon.

Q. Was he a member of that crew? A. A member of the crew.

Q. Now did you have any arrangements with Mr. Henry as to where to meet him? A. Yes, when my friend wrote to me.

Q. And that letter told you where to go and on what day to go, is that correct? A. That's right.

Q. And was that day November 24, 1948? A. That's right.

Q. Now where did you meet Mr. Henry on that day? A. It was at a gate at the pier.

Q. What pier, sir? A. Pier 88.

Q. Do you recall about what time of day it was? A. Around 12 o'clock, a little after 12.

Q. Pier 88, is that in the North River? A. Yes.

Q. The North River or the Hudson River? A. The west side.

Q. Had you ever been aboard the SS. Oregon before? A. Not before.

Q. Had you been aboard since? A. I haven't been aboard since.

Q. That was the only time in your life that you have been aboard this ship, is that correct? A. That's right.

Q. You say you met Henry or Mr. Henry at the gate. Will you describe the gate to us? A. At the entrance of the pier.

6 Q. Is that where the street is, would you say? A. That's right.

Q. And how far is it from the ship, about? A. Oh, it is about—well, I couldn't exactly tell you.

Q. Can you tell me, sir, was the distance from the gate greater than the size of this courtroom, the length of this courtroom, about? A. About twice that size.

Q. Twice the size? A. Yes.

Q. When you came to the gate did you have a pass? A. I didn't have a pass.

Q. How did you get past the gatekeeper? A. Henry had a pass for me.

Q. Did you see the pass? A. He looked at it.

Q. Did he show it to you? A. He didn't; he showed it to the gateman.

Q. Did you read the pass? A. I didn't read the pass.

Q. Did Henry read it to you? A. No.

7 Q. Did anyone read it to you? A. Nobody.

Q. At any time that day or any day after that day did you have that pass in your possession? A. I did not.

Q. Did you at any time read the language contained in that pass? A. I didn't read it.

Q. Now, did you know that you needed a pass to go aboard this ship? A. I knew that.

Q. Would you tell us how you knew that, sir? A. Well, I went on some other boats.

Q. And on those other ships were they also French Line ships? A. French Line.

Q. Did you also meet Mr. Henry on those ships? A. No, I didn't.

Q. Did you meet other members of the crew? A. Other members of the crew.

Q. And when you met these other members of the crew did you get a pass at that time? A. No, I didn't get the pass; they had it.

Q. The same way the pass was gotten this time, is
8 that correct? A. That's right.

Q. Do you know where Henry got this pass? A. I didn't know.

Q. Did you have any conversation at all with Mr. Henry about the pass? A. No.

Q. From the gate, after Henry showed the pass to the gatekeeper, where did you go? A. I went to his cabin.

Q. Would you please tell the Court and jury how you got to his cabin? A. Right through the pier from the gate, to the pier, up the gangplank and on the deck.

Q. You say you walked up a gangway to a deck, is that right? A. That's right.

Q. And then where was Henry's room with reference to this deck? A. On the same level, through a little corridor or hallway.

Q. Did you have to walk a great distance to get to his room? A. I did not.

Q. Did you walk up any stairs to get to his room?
9 A. I did not.

Q. The gangplank or gangplank or gangway was the only thing you walked to get to his room, is that correct, sir? A. That's right.

* * * * * * * * * * *

Q. When you came aboard did you have a package? A. I had a package.

Q. And what did you do with the package? A. I gave it to Henry and I told him—he knew who to deliver it to anyway.

Q. How long would you say you stayed in his cabin? A. From 12 o'clock to after 4 o'clock.

Q. During that period of time what did you do? A. I read.

10 Did you have something to eat? A. I had a ration.

Q. Tell us what you mean by a ration? A. A ration, some stew or—

Q. Do you remember exactly what it was you ate? A. What?

Q. Do you remember exactly what it was you ate? A. I couldn't tell you what it was. I think it was a stew, a French stew or something like that.

Q. Did you bring this on the ship with you? A. I did not.

Q. Where did you get it? A. Henry got it for me.

Q. Did he bring it to you or did you go to get it? A. He brought it to me.

Q. Did you have anything to drink with your dinner? A. Nothing at all.

Q. Did Henry remain with you in his cabin all of the time?. A. He was not.

Q. He was still working? A. He was working.

Q. How much of that time did he stay in the cabin
11 with you? A. From 12 o'clock to 4 o'clock or after four.

Q. And he would go in and out, is that correct? A. In and out.

Q. About 4 o'clock did you have a conversation with Mr. Henry? A. 4 o'clock, yes.

. . . . . .

Q. Did you invite Mr. Henry to your home? A. I did.

Q. Then what did Mr. Henry do? A. He wanted to see the doctor and he dressed up to go home with me.

Q. And when you say "he dressed up," was he wearing street clothes, a suit? A. Civilian clothes.

Q. Civilian clothes? A. Yes.

Q. What had he been wearing before that? A.
12 He was wearing kind of a white jacket, I don't know.

. . . . . .

Q. Where did you go after you left Mr. Henry's cabin? A. I was going home through the hallway.

Q. Will you tell us, Mr. Kermarec, what happened in the hallway? A. I was going down that stairs. He said, "Go down that stairs and wait for me there." He start to walk with me and at the same time somebody called him up there.

Q. Now, Mr. Kermarec, when Mr. Henry was called, as you say, from upstairs, about where were you on the steps? A. I was on the fourth step.

Q. And was that the fourth step from the top or the bottom? A. From the bottom—from the top.

Q. From the what, from the top or the bottom? A. From the top.

13 Q. What did you do when you heard someone calling Mr. Henry? A. I spoke to him and I told him to hurry up, I wanted to get home to avoid the rush hour.

Q. And then what did he do or what did you do? A. I went down and looked at the steps. It was nice and normal to me. When I reached that fourth from the bottom, the canvas slipped under my foot and I fell on the ledge of the stairs and I broke my right hip.

Q. As you fell did you strike any part of your body against the stairs? A. Against the side.

Q. I am sorry, sir, I did not hear you. A. My hip.

Q. As you approached the stairs will you describe it to us; tell us what they looked like as you came to the head of the stairs? A. There was a canvas—they were all covered with a canvas.

Q. Can you tell us the color of the canvas? A. White.

Q. How thick was it, if you know? A. Oh, about one-eighth of an inch.

14 Q. Were there handrails on the stairway? A. There was.

Q. Were there any signs posted telling you to stay off the stairway? A. No sign at all.

Q. Were you told by anyone on board the vessel to use these stairs? A. Yes, Henry tell me to go down the stairs.

The Court: The question was, did anybody tell you not to use those stairs?

The Witness: Oh, no.

The Court: Nobody?

The Witness: No.

Q. In fact, Henry was walking down the stairs with you, is that correct? A. That's right.

Q. Now you told us that Henry was called while you were on the fourth step from the top and that this accident happened while you were on the fourth step from the bottom. Will you tell us, sir, if you recall, about how many steps there are in between? A. Maybe seven or eight.

Q. After you fell what happened to you? A. Somebody took me downstairs or put me on his back and took

15 me back to where Henry's cabin is.

Q. Did you have any pain after you fell? A. Oh, plenty of pain.

Q. Where was that pain? A. In the hip.

Q. Do you know who it was who carried you? A. I believe Henry.

The Court: Will you tell us what hip it was?

The Witness: The right hip.

Q. To go to Henry's room did you go up any stairs or down any stairs? A. I went up some stairs but not the same stairs I fall down.

Q. Did you walk up those stairs yourself? A. I did not.

• • • • • • • • • • •

23 Q. After you fell, Mr. Kermarec, did you look at
24 the stairs? A. What?

Q. After you fell did you look at the stairs? A. I looked at it, yes.

Q. And can you describe to us the fourth step from the bottom? A. It was a canvas hanging there, that's all.

Q. Was it the same as the canvas on each of the other steps at that time? A. No, the other one was—they were all right.

Q. Do you know how this canvas was fastened to the step? A. I do not.

• • • • • • • • • • •

Cross Examination

By Mr. Garvey:

Q. Mr. Kermarec, when you were helped after the accident were you taken up the same stairway you fell
25 down? A. I was not.

Q. You were in quite a lot of pain, weren't you, right after the accident? A. Yes.

Q. How long were you lying at the foot of the stairway before you were taken away? A. Oh, they came down right away.

Q. Would you tell the Court and the jury—do you tell the Court and the jury that while you were lying down there at the foot of the stairway that you looked up the stairway? A. That's right.

Q. When did you first tell your lawyer about that? A. I fell right down the stairs.

Q. When did you tell your lawyer the first time that you looked up the stairway while you were lying at the foot of it? A. I fell on the side.

Q. Yes, but when did you first tell your lawyer about that?

Mr. Rosow: If your Honor please, I object to this.

26 The Court: No, I will allow it, but I don't think the witness understands it.

Mr. Garvey: I don't think he does, your Honor.

Q. Did you tell your lawyer that you looked up to see how the stairway looked while you were lying at the foot of it? A. I did tell him that.

Q. When did you tell your lawyer that? A. I told him I saw the—

Q. When? A. The lawyer—

Q. When? A. I only saw Mr. Rosow—

Q. You know that this case was tried before, don't you? A. That's right.

Q. Last May, is that right? A. I think so.

Q. You hadn't told your lawyer about looking up the stairway and looking at the canvas before the last trial, did you, had you? A. I did look up.

27 Q. What? A. I looked up.

Q. But you never told your lawyer about it before the other trial, did you? A. I don't remember that.

Q. Now, as a matter of fact, when you got to the hospital the morning after the accident you didn't know how the accident happened, did you? A. Well, I did know how it happened.

Q. What? A. I don't remember.

. . . . . .

Q. How many steps up the stairway did you look while you were lying down at the foot of the stairway? A. I could see the whole stairway?

Q. How was the first step at the bottom, did that look all right? A. Everything looked all right to me.

Q. All the way up it looked all right? A. All the way up except that fourth—the fourth from the bottom

28 where I fell.

Q. The first, the second and the third from the bottom, the canvas was tight on the stairway, was it? A. It looked tight.

Q. It didn't look loose, did it? A. No.

Q. Do you say that the fourth looked loose? A. The fourth was loose.

Q. How about the fifth and all the others above that? A. They looked normal to me, they looked all right.

Q. That canvas was all in one piece, wasn't it, running from the top to the bottom? A. All in one piece.

Q. The accident happened about 5 o'clock, didn't it? A. About 5 o'clock—between 4 and 5 o'clock.

Mr. Garvey: May I read from the hospital record?

The Court: Is that Exhibit A?

Mr. Garvey: Yes, that is right.

The French Hospital. Name, Joseph Kermarec. 11/25/48, admission note:

"First F.H."—French Hospital.

"Admission of a 61 year old white male who was
29 injured at about 5 p.m. yesterday while on the SS. Oregon. He fell and injured right hip. He is not quite certain of the manner in which he was injured. He is unable to rise and remained on the ship overnight."

The morning after the accident happened you didn't know how this accident happened, did you, Mr. Kermarec? A. I didn't know about—I don't remember what happened.

Q. You did not know how the accident happened the day that you arrived at the French Hospital, did you? A. No.

Q. Since then, since that time, you have talked about your accident to a lot of people, haven't you? A. I don't remember speaking to anybody about it.

Q. Haven't you talked to a lawyer and other people about the accident since it happened? A. I talked to my son-in-law and my daughter, that's all.

Q. Did you talk to your lawyer about it? A. What?

Q. Did you talk to your lawyer about it? A.
30 My lawyer?

Q. Yes. A. I believe I did; I don't remember.

Q. Did you ever tell your lawyer that you looked up and saw that the canvas on the fourth step was loose?

Mr. Rosow: I object to that, your Honor, on the ground that it has been gone into and answered several times already.

A. I did.

Q. When? A. I don't remember the date.

Q. Was it in the last couple of months? A. I can't remember that.

Q. Now, you were on board this boat for almost five hours when this accident happened, is that correct? A. That's right.

Q. You knew you had to be off before 5 o'clock, didn't you? A. That's right.

Q. And do you say that you arranged for Henry to go to your home to Brooklyn that night? A. Yes, sir.

Q. Did you have some refreshments aboard the
31 boat? A. I didn't have any refreshments.

Q. Did you meet a man by the name of Rene Dufy? A. No.

Q. Did you meet a man by the name of Rene Dufy? A. I was introduced to him, yes.

Q. Where did you meet him? A. He was at the head of the stairs in the hallway.

Q. That was how long before your accident? A. A few minutes before.

Q. Do you know what his job on the boat was? A. Well, I didn't know at that time.

Q. What do you know now? A. What I read in the paper, he was a bar man.

Q. By a bar man you mean a man who serves wines and so forth, is that right? A. That's right.

Q. Did you go to the bar at all that day? A. I didn't go to that bar.

Q. Did you go there with Henry? A. I did not.

Q. Do you take a glass of wine once in a while, Mr. Kermarec? A. I do once in a while.

32 Q. Does Mr. Henry? A. I believe he does.

Q. You were a guest, his guest there, that day, weren't you? A. That's right.

Q. Didn't he offer you anything? A. He didn't have any.

Q. Did he offer you anything? A. He didn't have any wine.

Q. How do you know that? A. Well, the ration he had the day before, he drank it before.

Q. You mean the ration of wine that he had from the day before? A. He told me he was sorry he did not have a glass of wine.

Q. Did he tell you that his ration from the day before was gone? A. Was gone, yes, sir.

Q. Did he say anything about his ration for that day, the day of the accident? A. No, sir.

Q. What? A. No, sir.

33 Q. Did you have any coffee? A. No coffee.

Q. Any milk? A. No milk.

Q. Any water? A. No.

Q. You had nothing to drink of any kind from 12 noon until 5 o'clock when you were—about 5 o'clock when you were about to leave? A. No, sir.

Q. But you did have something to eat, didn't you? A. I did.

Q. When did you have that? A. A little after 12 o'clock, I believe.

Q. Now when you went to Mr. Henry's cabin you only went up a gangway, didn't you? A. That's right.

Q. Did you attempt to leave the boat by going down that gangway? A. I did not.

Q. About how wide was the stairway that you went down? A. About five or six feet.

Q. About five or six what? A. Five or six feet.

34 Q. As you walked down could you hold the railing or banister on each side with your right and your left hand? A. Yes, I was holding the right—

Q. I want to know, Mr. Kermarec, was the stairway narrow enough so that as you walked down you could hold the railing on either side with each of your two hands? A. No, I couldn't do that.

Q. What? A. No, sir.

Q. Was it too wide for that? A. Too wide.

Q. Had you ever been on a French Line boat before? A. I did, sometimes.

Q. That was before the day of the accident—I mean before the day of the accident had you been on French Line boats before? A. Before the accident?

Q. Had you been— A. No, sir.

Q. I read from the testimony that you gave at the last trial, Mr. Kermarec, page 42, and I am going to ask you, Mr. Kermarec, if you gave this testimony last May in the trial of this case:

35 "Q. Now, you knew then that Mr. Henry was getting the pass for you, did you?

"A. Yes, sir.

"Q. He was acting for you in doing that, was he?

"A. Yes, sir.

"Q. Had you gone on any of the French Line boats before the day of the accident?

"A. No, I didn't.

"Q. Never?

"A. Never."

Now did you give that testimony last May in the trial of this case? A. I don't remember that.

Q. Do you say that you did not? A. I don't remember it.

Mr. Garvey: Will you concede that he did, Mr. Rosow?

Mr. Rosow: Well, the witness has said that he does not remember giving those answers but I will stipulate that that is the testimony in the record.

Mr. Garvey: That he gave that testimony

Mr. Rosow: Yes, I will so stipulate.

Q. Now had you been on a French Line boat before
36 the day of the accident? A. I did, sometimes.

Q. How many times? A. Oh, I couldn't tell you, about three or four times.

Q. At the last trial you said that you had never been on a French Line boat before the accident; was that true? A. I don't remember.

Mr. Rosow: I object to that, your Honor, on the ground that the witness has said that he does not remember saying it.

The Court: I will allow it.

Q. Was the testimony that you gave last May, when you said you had never been on a French Line boat before the day of the accident, was that true? A. I can't remember.

Q. About how many times now do you say that you were on a French Line boat before the day of this accident? A. About two or three—three times, four times.

Q. And each time that you had been on a French Line boat, from what you testified in answer to your lawyer's questions this morning, you went to visit some mem-
37 ber of the crew, is that correct? A. That's right.

Q. Not for any business of the ship? A. No.

Q. As a matter of fact, the reason that you were there on the day of the accident on which you are now suing was only in connection with some business of your own, is that correct? A. That's correct.

Q. It had nothing to do with the ship at all, did it? A. Nothing at all.

Q. And the arrangements that were made between you and your friend who wrote to you about the taking of a package to the ship, that was done with Henry to get the pass for you, is that right? A. That's right.

Q. He was acting for you in doing that, is that correct? A. He was.

Q. You had seen similar passes as the pass that you saw that day, had you not, on occasions before the accident? A. I didn't see it.

Q. Well, you said you saw the pass this day when
38 Mr. Henry gave it to the gateman, didn't you? A. At the time he handed it to the gateman.

Q. You saw it at that time but at that time you didn't read it? A. I didn't read it.

Q. But had you not seen similar passes which you had read before the day of the accident? A. I did not.

Q. Did you know what was on those passes? A. I did not.

Q. Don't you know that it was written in both English and French? A. No, sir.

Q. You know when you arrive at a gate to go on a vessel that the pass is torn off at one part and given to the gateman? A. I don't know that.

Q. Didn't you see Mr. Henry give a part of the pass to the gateman when you went aboard the ship? A. No, sir.

Q. Did you see him show it to the gateman? A. I see him show it to the gateman.

Q. After he showed it to him what did you see him
39 do with it? A. He had it in his pocket, that's all.

Q. Don't you know that the pass can be torn off so that one part is given to the gateman when you go on? A. I don't know that.

Q. In the two or three times that you now say that you have been on board French boats before don't you know that the pass is torn in two parts and one part given to the gateman when you went on board? A. I don't know that, sir.

Q. And don't you know that one part is given to the gateman when you leave? A. No, sir.

Q. When you left the French Line boats on the times before the accident, on those two or three times, whatever it was, how did you get out? A. Well, I went through the pier, through the gate.

Q. And somebody had a pass, didn't they? A. Nobody.

Q. Didn't your friend, whoever he was, have part of a pass that he had to give to the watchman or the gateman? A. I don't know that.

Q. Well, your name is Joseph Kermarec, isn't it? A. That's right.

40 Q. These are the passes that were used that day, isn't that right, Mr. Kermarec? A. Yes.

Q. You have indicated the one that has the stamp with Exhibit A on it.

Mr. Garvey: I offer that in evidence.

Mr. Rosow: No objection.

(Marked Defendant's Exhibit B.)

Q. I show you the other paper here, Mr. Kermarec. Do you recognize that as being part of the same pass, the same number and everything? A. I only saw it one time.

Q. You saw this one here (indicating)? A. Yes.

Q. This one here? A. Yes.

Mr. Garvey: This is Exhibit B. May I read it to the jury, if the Court please?

The Court: The one that is marked Exhibit B?

Mr. Garvey: Yes, that's right.

May I apologize for my French, but other than that I think I can go right along.

"No. 4424, French Line, Compagnie Generale Transatlantique, Pier 88, North River, foot of West 48th

41 Street, visitor's pass, company's copy, to be collected at entrance of pier. Date, 24 November, 1948.

"Admit Mr. Kermarec, Joseph, to visit SS. Oregon, from 9 a.m. to 5 p.m. only, to visit M. Henry.

"The person accepting this pass, in consideration thereof, assumes all risks of accidents and expressly agrees that the Compagnie Generale Transatlantique shall not be held liable under any circumstances whether by negligence of their employees or otherwise, for any injury to his person, or for any loss or injury to his property.

"It is issued upon the express condition that it confers no right to enter the pier or ship unless shown whenever required and is subject to such rules and regulations as the Compagnie Generale Transatlantique may make from time to time."

Then it has "Compagnie Generale Transatlantique, with a signature, and the word "Captain" and "Commander." "This pass permits entry into crew's quarters."

Mr. Rosow: Just one thing: Under the signature
42 to the left of the word "Commander" there is stamped what looks like "Capitain," the second captain.

. . . . . .

46 Q. As you were going down the stairway leaving the ship, before anything was said by anybody, where was Henry, was he alongside of you or in back of you? A. He was alongside of me.

Q. That was before anything was said by anybody, is that right? A. That's right.

Q. He was not back of you or up toward the head or the top of the stairs, was he? A. He wasn't on the top of the stairs.

Q. But before somebody called him he was alongside of you or in back of you? A. He was alongside of me.

Q. Where were you when you heard somebody call? A. On the fourth from the top, the four steps.

Q. Do you know who called? A. I don't know who called.

Q. Don't you know that it was Rene Dufy? A. I don't know, sir.

Q. What did Mr. Henry do when somebody called?
47 A. He talked to him. He talked to somebody—I don't know who it was, one of the crew or—

Q. What? A. I don't remember who it was.

Q. What did Mr. Henry do when somebody called? A. He went upstairs.

Q. How far up the stairway did he go? A. The fourth floor, the fourth step.

Q. The fourth step? A. From the top.

Q. Four steps up to the top or from the fourth, or did he walk as far as the fourth step? A. From fourth to the top.

Q. When he started to go up from the fourth step were you then on the fourth step? A. I was on the fourth step.

Q. And when he started to go up did you turn around? A. Yes, I spoke to him.

Q. Did you turn around? A. I turned my head.

Q. Did you turn around? A. I didn't turn around.

Q. Did you turn around at any time while you
48 were going down the stairway that afternoon? A. I turned my head to talk to him.

Q. And which way did you turn? A. On the left.

Q. And were you on the fourth step from the top when you made that turn of the head, as you say? A. That's from the top, yes.

Q. After that, after you say you turned and Henry started to go to the top, what did you do? A. I stopped there for a while and told him to hurry up, I wanted to go home to avoid the rush hour.

Q. You were in a hurry, weren't you? A. That's right.

Q. Did you hear the voice of a man that called to Henry? A. I did hear the voice.

Q. That was Rene Dufy's voice, wasn't it? A. I don't know if it was.

Q. Where did the voice seem to come from? A. From the top of the stairs.

Q. You had seen Rene Dufy right up at the top of the stairs before you started going down, didn't you? A. Yes, I did.

Q. You saw Rene Dufy right after the accident,
49 too, didn't you? A. I don't remember that.

Q. Didn't he come down to the bottom of the stairway where you were? A. I know I was picked up down there but I don't know who picked me up.

Q. Don't you know that Rene Dufy was down there? A. I couldn't tell you, sir.

Q. Do you remember testifying on an examination before trial in 1951, Mr. Kermarec, that you were three or four steps below Mr. Henry when somebody called to Henry?

• • • • • • • • • • •

Q. Mr. Kermarec, I am going to ask you if you did not give this testimony in July 1951 when your lawyer, who was here, was present, and listen to the questions and answers, will you, Mr. Kermarec.

On page 11:

• • • • • • • • • • • •

51 "Q. Well, how far back of you was Henry when this party called?

"A. He was at the head of the stairs.

"Q. You were only a couple of steps down at that time, weren't you?

"A. That's right.

"Q. About how many steps down below were you from Henry when this party called Henry?

"A. About three or four steps."

Now did you hear me read those questions and answers? A. Yes.

Q. You gave that testimony, didn't you? A. That's right.

Q. What? A. That's right.

Q. Was he alongside of you when somebody called? A. He was alongside of me.

Q. What? A. He was alongside of me.

Q. He was or was not? Did you say he was? A. He was.

Q. You gave this testimony about over four years ago when it was closer to the accident? A. Yes.

52 Q. Was your memory better then than it is now? A. I don't think so.

Q. Was he three or four steps up the stairway back of you? A. No.

Q. When somebody called? A. He was walking alongside with me, he was called up.

Q. Yes, but when somebody called he was also back of you, wasn't he? A. He was on the side.

Q. In back of you, too, wasn't he? A. A little bit back, maybe.

Q. As a matter of fact, there is hardly room for two people to walk down alongside of each other on that stairway, isn't that right? A. There is space.

Q. It is only about three feet wide, isn't it? A. More than that.

Q. How wide would you say it is? A. About four or five feet.

Q. It would be about—you know what a meter is? A. That's right.

Q. It is about 39 inches, is that correct? A.

53 About 39.

Q. Wasn't it about a meter wide? A. It is over a meter wide.

Q. Reading further from the examination before trial on page 12, after that question:

"Q. About how many steps down below were you from Henry when this party called Henry?

"A. About three or four steps.

"Q. What did you hear this man say?

"A. I didn't hear it. I just heard him call Henry and Henry went up.

"Q. When you heard that did you turn around to see who was calling?

"A. No.

"Q. You continued to walk down?

"A. Yes.

"Q. You walked about four or five more steps, did you?

"A. That's right.

"Q. No trouble of any kind?

"A. No.

"Q. The canvas on the steps looked all right all the way down?

"A. Yes, everything looked normal to me.

54 "Q. And then when you got to the fourth step down what did you notice?

"A. Well, the whole canvas slipped under my foot and I lost my balance. I was holding the rail but I let go the rail."

Now every step looked all right including the fourth one from the bottom as you walked down? A. It looked normal to me.

Q. You didn't see anything loose about it? A. I didn't see anything loose about it.

Q. Did your foot slip? A. The canvas slipped.

Q. Which step did you have on the fourth step from the bottom as you were going down?

Mr. Rosow: Which what?

Q. Which foot? A. My right foot.

Q. And then did you go down putting both feet on each step or did you put first the right foot on one step and then the left foot on the next step? A. The right foot on one step and the left foot on the next one.

Q. Your left foot was never on the fourth step from

55 the bottom, was it? A. No, it wasn't.

Q. Did the canvas slip as you put your foot on the fourth step or as you were taking it off? A. On the fourth step, I was putting it on.

Q. What? A. I put my foot on.

Q. You still had your foot on the fifth step, did you? A. On the fourth step.

Q. I know, but as you were putting your foot on the fourth step your right foot, your left foot, was still on the fifth step, wasn't it? A. It was.

Q. The canvas didn't slip on that step, did it? A. No, it didn't slip there.

Q. The canvas was clean, was it? A. It looked clean.

. . . . . .

56 Q. Did Mr. Henry come down that stairway after
57 you fell? A. He did.

Q. He didn't fall, did he? A. No, he didn't.

. . . . . .

Q. Is that a fair picture of the stairway as it looked that day as you started to go down? A. It looks like it.

. . . . . .

59 Q. Mr. Kermarec, just before we went to lunch you identified this picture as a picture looking down the stairway. Is that also, what I am showing you now, a fair picture of the stairway looking up?

Mr. Rosow: I object to the question.

Q. As it looked that day?

Mr. Rosow: I object to the form of the question on the ground—

The Court: I will allow it.

Q. Do you know the question, Mr. Kermarec? A. It looks like it.

Offer in Evidence

Mr. Garvey: I offer it in evidence.

The Witness: Before I had the accident.

Mr. Rosow: What were the last words.

(Record read.)

Mr. Rosow: I have no objection.

(Marked Defendant's Exhibit D.)

Mr. Garvey: I have no further questions.

60 Redirect Examination

By Mr. Rosow:

Q. Mr. Kermarec, you have just looked at two photographs and identified these photographs as the way the stairway looked before you had your accident, is that correct? A. That is right.

Q. Mr. Kermarec, after you had your accident did the stairway look the same as it does in these photographs? A. No.

Q. Would you please tell us how it differs, what is different about the stairway after your accident? A. The canvas was straightened down.

Q. Would you be kind enough to speak louder because it is very difficult to hear you. A. The canvas was straightened down on the stairway.

Q. Where was that, sir? A. On the fourth from the bottom, the fourth step from the bottom.

The Court: I am afraid I don't know what "straightened down" means.

The Witness: It is off the ledge of the step?

The Court: Off the lead?

The Witness: Off the ledge.

61 The Court: Off the ledge?

The Witness: Yes.

Q. Do you mean, sir, that it was not smooth to the step as it is in these photographs? A. No, not after.

Q. I am sorry, sir, I cannot hear you? A. No.

Q. When you entered the hospital that morning how did you feel? A. I was in pain.

Q. Did you have a conversation with the doctor that morning? A. Yes, sir, I did.

Q. Do you remember what you told the doctor that morning? A. I don't remember at all what I told him.

Q. I am sorry, sir, I can't hear you.

The Court: He does not remember at all what he told him.

The Witness: I was in pain.

Q. At the time you entered the hospital did you know how this accident happened? A. Yes, I knew.

Q. Have you known ever since the moment it hap-

62 pened the manner in which it happened? A. Yes, I knew.

Q. When you spoke to your lawyer, myself and the other attorneys in the office, did you tell us how this accident happened? A. I did tell it.

Q. And is that exactly the same as you have told it to the Court and jury this morning? A. I do.

Mr. Garvey: I object to that.

The Court: Sustained.

Q. Now, you may recall that Mr. Garvey asked you some questions and answers which he read to you from your examination before trial on July 16, 1951. Do you recall his reading questions and answers to you? A. Yes.

Q. I am going to read some questions and answers to you from that same examination and ask you if the answers that you gave at that time were true.

Mr. Rosow: On page 11, Mr. Garvey, the first question and answer immediately before the series of questions which you asked.

Mr. Garvey: What page?

Mr. Rosow: Page 11.

63 Q. Do you remember being asked this question and giving this answer:

"Q. What did this party say to Henry when he called to him?

"A. Oh, I don't know, he went up to the top of the stairs to talk to him."

Do you remember giving that answer to that question? A. That's right.

Q. When you say "he went up to the top of the stairs," who do you mean? A. Henry.

Q. On page 6 of this examination on July 16, 1951, do you remember Mr. Garvey asking you this question and you giving this answer:

"Q. You have been on other French boats on occasions before this?

"A. Yes."

Is that the truth, Mr. Kermarec? A. Yes, Sir.

Mr. Garvey: I object to that.

The Court: I will allow it.

Q. Do you remember this series of questions and answers—

64 Mr. Rosow: Page 16, Mr. Garvey, in the middle of the page:

Q. "Q. Did you turn around to ask your friend Henry to hurry up while you were on the stairway?

"A. When somebody called him I told him, hurry up, I want to get home before the rush hour.

"Q. And you were still on the stairway about four steps from the bottom, weren't you?

"A. No, that was before I reached the fourth step, that was about the fourth step from the top.

"Q. When you were about four steps from the top you turned around to speak to him and asked him to hurry?

"A. That's right.

"Q. All right. And after you had spoken to him when you were about four steps from the top then you started down again, didn't you?

"A. I started down, yes."

Were those your answers to those questions? A. Yes.

Q. And then on page 18, in the middle of the page, again I read to you the questions and answers which were taken at that examination in 1951:

"Q. Well, wherever you were on the stairway when
65 you turned to speak to Henry and asked him to hurry did you take your hands off the handrails then?

"A. No, I did not.

"Q. When you turned what way did you turn?

"A. I turned left.

"Q. You turned left?

"A. Yes.

"Q. And it was your right hand that you say you had on the handrail?

"A. That's right."

Were those your answers to those questions which you gave in 1951? A. Yes.

Q. Now, Mr. Kermarec, do you ever remember before this trial being asked any questions concerning what you saw as you were on the ground at the foot of the stairs—do you remember anyone asking you anything at all about that? A. Nobody asked me a question like that.

Mr. Rosow: No further questions.

. . . . . .

66 Recross Examination

By Mr. Garvey:

Q. You never told anybody up until the time of this trial beginning today that you looked up the stairway, did you, Mr. Kermarec? A. Yes, I did. I told my lawyer about it.

Q. He asked you about it? A. Yes.

Q. Didn't you just tell us, did anyone ever ask you and you said no?

Mr. Rosow: I object to that.

The Court: It is up to the jury—

Q. Didn't you just tell Mr. Rosow that nobody ever asked you?

Mr. Rosow: I object to the form of the question.

The Court: I will allow it.

A. No, I told it to somebody else.

Q. Do you remember this morning saying that you did not know whether Mr. Dufy went down that stairway to help you after you fell? A. No, I was in pain and I don't remember who came down.

Q. You don't know whether it was Mr. Dufy who
67 went down or not, do you? A. No.

Q. But you do remember looking up the stairway? A. I do.

Q. I will read from page 19, beginning the second question:

"Q. Well, did your friend Henry come down to you?
"A. I believe he was down.
"Q. Well, as a matter of fact, you know he did, don't you?
"A. Yes.
"Q. And Dufy came down too, didn't he?
"A. I think Dufy came down, too, yes."

This was in 1951 that you gave those answers to those questions, didn't you? A. I don't remember that.

Q. Now, I think—had you seen that stairway at all on that day until you started to go down the stairway, Mr. Kermarec? A. I did not.

Q. Not at all? A. No.

Q. You had never looked up that stairway that day
68 before the accident, had you? A. No, sir.

Q. Now you say that is the way it looked though before the accident? A. Yes.

Q. I am referring to the pictures that are here in evidence, Exhibits D and C. Looking at Exhibit D you say that is the way it looked before the accident, is that correct? A. Yes.

Q. Did you ever see it before the accident? A. I didn't see it before the accident.

Q. But you say that is the way it looked before the accident? A. I saw it before the accident when I was coming down.

Q. But that is looking up that photograph, isn't it? A. Not looking up.

Q. It is not looking up the stairway? A. No.

Q. Well, that is looking at it sideways. Hold it this way or this way, whichever way you will, that is a view looking up, isn't it? A. Yes.

Q. Is that the way it looked when you saw it
69 that day? A. Yes.

Mr. Garvey: That is all.

Mr. Rosow: That is all, your Honor.

(Witness excused.)

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92 Mr. Rosow: I should like to read at this time portions of the testimony of Mr. George Boudon whose testimony was taken on May 17, 1955, and the witness was produced as a witness for the defendant, French Line or Compagnie Generale Transatlantique.

• • • • • • • • • • •

93 Page 7, question 2—these questions are by Mr. Garvey:

94 **Deposition of George Bourdon**

"Q. Do you know who put that canvas on that stairway?

"A. It was I."

Page 9, Question 6:

"Q. Did you do anything to fasten the canvas on the stairway?

"A. Yes, I used tacks.

"Q. Where did you put the tacks?
"A. Near the edge.
"Q. Edge of what?
"A. Of the canvas.
"Q. I show you this photograph that has been marked Defendant's Exhibit B for identification, with initials 'H.M.', dated 5/3/55, on an examination of another witness, and ask you if you recognize that photograph, Mr. Bourdon (handing document to the witness).
"A. Yes."

This is the photograph shown to the witness.
The Court: What exhibit is it in this trial?
Mr. Rosow: It is Defendant's Exhibit C in this trial:

"Q. What is that a photograph of?
"A. This is a picture of the stairway and of the steps.
95 "Q. Mr. Boudon, will you mark by an 'X' approximately where you say you used tacks to tack down the canvas, in just one place?
"A. Here (complying with request)."

May I show that to the jury? There is a crossmark on the top step on each side, little ink crossmarks.
Page 20, question 5. These questions were asked by myself.

"By Mr. Rosow:

"Q. How many tacks did you put into each step?
"A. One on each side, on either side of every step.
"Q. What was the size of the tack that you used?
"A. Just small, like this (indicating).
"Mr. Rosow: Let him draw it on a sheet of paper and we can mark it for identification."

Mr. Garvey, do you have that drawing?

(Mr. Garvey hands paper to Mr. Rosow.)

Mr. Rosow: "The Witness: The head—you can't see it here—but the head it flat, fairly big and flat.

"Mr. Rosow: Mark that as a drawing of what the witness says the tack looked like, except that the top was flat.

"Mr. Garvey: Let us make that a defendant's
96 exhibit.

"Mr. Rosow: All right."

I offer this as Plaintiff's Exhibit 5.

Mr. Garvey: No objection.

(Marked Plaintiff's Exhibit 5.)

Mr. Rosow: May I show it to the jury. The drawing made by the witness of the tack is marked here:

"The Witness: It was of red copper, the point.

"By Mr. Rosow:

"Q. I show you Defendant's Exhibit D for identification, and ask you to show me, with a pencil mark, that portion of the tack which went into the step.

"A. Here (indicating).

"Mr. Garvey: Do you mean above or below the line?

"The Witness: This part is in the step. I am erasing this because this looks round; it is really flat.

"Q. In other words, everything that is below this line that you have drawn was in the step?

"A. In the rubber of the step.

"Q. And through the canvas?

"A. Through the canvas, to fasten the canvas through the rubber.

97 "Q. And that particular black line you have drawn on top of the line represents the flat head of the tack; is that right?

"A. Yes, that is it.

"Q. Was the head of the tack then above the canvas?

"A. Yes, it is so. But after you have driven it in, everything is flush.

"Q. How did you drive in this tack?

"A. With a small hammer. You have to use a small hammer, but underneath the rubber the steps are made of wood."

One more question, page 23:

"Q. Will you describe to me the manner in which you took these tacks out when you went to clean the stairs?

"A. It is not hard at all. You just get hold of the canvas and then the tacks come out by themselves."

* * * * * * * * * *

99 Mr. Rosow: May I, before Mr. Garvey makes his motion, may I at this time your Honor, make a motion to amend the pretrial order so as to include the cause of action for the unseaworthiness of the vessel as it relates to this plaintiff.

The Court: I think it is too late to do this at this time. The pretrial order, as I look at it, is dated in 1953, but I do not deny it on the ground that you are late or that there is laches but I will deny it as a matter of law.

Mr. Rosow: May I respectfully except.

Motion for Dismissal of Plaintiff's Complaint

Mr. Garvey: If the Court please, I respectfully move for the dismissal of the plaintiff's complaint on the ground that there has been a total failure to prove a cause of action against the defendant in negligence; on the ground that there is no proof of any condition of which the defendant knew, of which it may have corrected, assuming that there was anything dangerous at the time plaintiff was descending the stairway; on the ground that there
100 has been a failure to prove on the part of the plaintiff his freedom from contributory negligence; on the ground that the plaintiff in this instance was on the vessel in no way to the mutual benefit of himself and the defendant, but he was there solely for his own purposes and as a vistor, not to the vessel as an invitee of the defendant but purely as a social visitor to an employee of the defendant; that under the circumstances he was no more than a licensee, and that as to the plaintiff in that relationship that there is no legal liability running against the defendant except for active affirmative negligence or for the wanton and wilful neglect to the plaintiff unless there was a trap, and I respectfully argue in this case that the facts do not support any claim that the condition prevailing at the time was one constituting a trap, and I believe the law applying here is the law of New York, having occurred within its jurisdictional limits and not that of maritime application, in that what occurred here occurred not in relation to one, the owner of a vessel, and one having some relationship to the defendant on that vessel in the nature of a longshoreman, seaman or a member of the crew.

101 On those grounds I respectfully move for a dismissal of the complaint.

The Court: I will reserve decision.

Mr. Garvey: And on the further ground, on the affirmative defense pleaded in the answer, that on the conditions under which the plaintiff was on the vessel, he was there only by license and by pass, and by the terms of that license and pass he exonerated and released any claim that he might have had otherwise by reason of negligence or the actions of any employee of the defendant, and on the ground that it appears here that while he says he himself did not obtain that pass and claims that he did not read it or know its contents, that the one who obtained it and by whom he had the use of it was acting for him as his agent and not as an agent or employee of the defendant.

The Court: I will reserve decision on that also.

* * * * * * * * * * *

102 THOMAS FLOOD, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Garvey:

Q. Mr. Flood, who is your employer? A. French Line.

Q. And how long have you worked for that company? A. Ten years at least.

Q. Were you working for them in November 1948? A. Yes, I was.

Q. What is your particular line of work? A. I was a guard at the gate.

Q. Among your duties there was the picking up of passes, is that right? A. Of visitors.

Q. Defendant's Exhibit D in evidence on this trial, is that the company's pass as issued or is there any other part to it? A. Those two together.

Q. Are they fastened together as they are issued? A. That's right.

Q. With a perforated line down the center, is that correct? A. Yes.

103 Q. Looking at Defendant's Exhibit B in evidence and this other one that I hand you, I ask you if

that comprises the complete pass, those two? A. Yes, it does.

Mr. Garvey: May I offer this in evidence.

Mr. Rosow: No objection.

(Marked Defendant's Exhibit E.)

Q. Mr. Flood, I notice at the bottom of this pass, "Admit entry into crew's quarter," at the bottom, and up at the top below some letters, "Visitor's Pass," and also "Visitor's Pass," and on this one it says, "Company's Copy." Is that the one that is picked up as they come in? A. That is the one that is picked up at the gate, and the other one is given to the visitors and you pick it up when they come out.

Q. That is Exhibit E? A. Yes.

Mr. Garvey: That is all.

Cross Examination

By Mr. Rosow:

Q. Mr. Flood, are you still employed in the same capacity? A. No.

104 Q. What is your job now? A. I am a verifier now.

Q. What, sir, is a verifier? A. That is checking trucks and tallies as they come out the ship.

Q. In 1948 can you tell us who issued this pass? A. I believe the captain on board the ship or the second captain.

Q. And to whom would it be issued? A. To the visitor.

Q. And how would the visitor get it? A. Somebody would bring it down off the ship or would leave it at the entrance to the pier.

Q. Do you see this gentleman in the back? A. I see him.

Q. Do you remember seeing him on November 24, 1948? A. No, I do not.

Q. On November 25, 1948? A. No, I do not.

Q. Do you remember receiving a pass from him? A. No.

Q. Do you remember receiving a pass from any crew member when Mr. Kermarec was aboard the ship? A. No.

105 Q. You have no recollection of the events of that day, do you, sir? A. No, I don't.

Q. Do the visitors sign this pass? A. I don't believe so.

Q. In other words, the officer of the vessel or a member

of the crew writes the name of the visitor and the officer on the ship signs it and authorizes the visitor to come aboard, is that correct? A. That is as far as I know.

Q. And your only knowledge of the pass is that somebody gets it on the ship and brings it to the visitor or leaves it in the gate house? A. That's right.

Q. You do not know, however, how this pass was presented on Noyember 24th and 25th, 1948? A. I have no idea.

Q. Did you just examine these pasess when Mr. Garvey showed them to you? A. Yes.

Q. Do you recognize any of the handwriting on that pass? A. No, I do not.

Q. And you have no independent recollection of
106 the events of that day, do you, sir? A. No, I have not.

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107 **Deposition of Henry Yves**

"HENRY YVES, having been first duly sworn by the Notary Public (through the Interpreter), was examined and testified as follows:

"Examination By Mr. O'Brien:

• • • • • • • • • • •

"Q. On the 24th day of November, 1948, what was your business?

"A. I was a nurse on the steampship OREGON.

"Q. By whom were you employed on the 24th of November?

"A. By the French Line.

"Q. How long, prior to November 24th, 1948, were you employed by the French Line?

"A. I started with the company in 1920.

"Q. Are you still employed by the French Line?

"A. Yes, sir.

"Q. What are your duties now?

108 "A. I am a male nurse. I have to take care of the sick people.

"Q. What ship are you assigned to now?

"A. On the LIBERTE.

"Q. On the 24th of November, 1948, were you on board the steamship OREGON here in the Port of New York?

"A. Yes, sir.

"Q. Where was the Steamship OREGON berthed in the Port of New York?

"A. I don't remember what dock it was. It was the dock of the French Line.

"Q. If I should tell you that the Steamship OREGON was berthed at Pier 88, North River, would that refresh your recollection?

"A. I believe that was the one, but I cannot guarantee that that was the case.

"Q. In November of 1948 did you know a man by the name of Joseph Kermarec?

"A. Yes, I knew him.

"Q. How long before November of 1948 did you know Mr. Kermarec?

"A. I had known him for quite a long time, but I cannot state how long. I made his acquaintance through some friends of mine.

109 "Q. On November 24th, 1948, did you have occasion to see Mr. Kermarec on the Steamship OREGON here in the Port of New York?

"A. Yes, I did see him.

"Q. Under what circumstances did you meet Mr. Kermarec on the Steamship OREGON on November 24th, 1948?

"A. He came to see me, because his friends in France had given him a message or something to do for me.

"Q. Did Mr. Kermarec come to visit you on board the steamship Oregon on the 24th of November, 1948?

"A. Yes, that was the reason.

"Q. Did you arrange for a pass for Mr. Kermarec to come aboard the ship?

"A. I don't remember.

"Q. Did he give a pass when he came aboard the ship?

"A. He had one. He had the pass.

"Q. Do you remember what time of the day on November 24th, 1948, Mr. Kermarec came aboard the SS. Oregon to visit you?

"A. I know it was the afternoon, but I don't know what time.

110 "Q. While Mr. Kermarec was aboard the SS. Oregon, where was he, what part of the ship?

"A. Well, he came to see me in the infirmary.

"Q. How long did he stay aboard the ship?

"A. I can't say.

"Q. About how long?

"A. I don't know. It is too long ago. It is seven years ago and I can't remember these things any more.

"Q. Do you know whether he was there for several hours before something occurred or something happened to him?

"A. Possibly one or two hours, but I cannot state that definitely.

"Q. While he was aboard the ship—while Mr. Kermarec was aboard the ship, did he partake of any food there, did he have anything to eat, do you recall?

"A. I believe he ate with me, I believe.

"Q. What time was that?

"A. I cannot say. It is no use me telling you something that I cannot be sure.

"Q. Did he have any beverage of any kind while he was aboard the ship?

"A. Yes, he went to the bar. He had something to drink.

111 "Q. What did he have to drink?

"A. I don't know.

"Q. Were you with Mr. Kermarec when he was at the bar?

"A. Yes, I was with him.

"Q. When you say 'the bar,' is that on the Salon Deck of the ship?

"A. Yes, in the salon.

"Q. What deck is that?

"A. There is only one Salon Deck.

"Q. Well, how long were you at the bar with Mr. Kermarec?

"A. Not very long, perhaps a half hour or so.

"Q. Do you remember what Mr. Kermarec drank and what you drank at the time?

"A. I don't remember. I remember we had something to drink, but what, I don't know.

"Q. Do you know whether it was beer, wine, or liquor.

"A. I don't remember. Anyway, at the time there wasn't much to be had on board the ship.

"Q. Do you know whether Mr. Kermarec drank any wine while he was at the bar?

"A. He drank a glass of wine with me while we ate.
112 "Q. Were you at the bar before you ate or after you ate?
"A. After we ate, we went to the bar.
"Q. What did Mr. Kermarec have at the bar after you ate?
"A. I don't remember. All I remember, we had a glass of wine while we were eating, but afterwards, I don't know.
"Q. Now, did something happen to Mr. Kermarec while he was aboard the SS. Oregon.
"A. Yes, something happened to him while he was going down the stairs that lead to that bar. He fell down on the stairway."

Mr. Rosow: At this time, your Honor, I should like to move to strike everything after the word "Yes" as not responsive to the question.
The Court: Would you read it to me again. I thought it was responsive.
Mr. Garvey: I will read both the question and answer, your Honor.

"Q. Did something happen to Mr. Kermarec while he was aboard the SS. Oregon.

"A. Yes, something happened to hime while he was going down the stairs that lead to that bar. He fell
113 down on the stairway."

Mr. Rosow: I think that everything after "Yes" is not responsive. He was asked if something happened and he said, "Yes."
The Court: I will allow it.
Mr. Garvey: (Continuing to read:)

"Q. Well, where is the stairway located; is that between the decks?
"A. Yes, it is between the decks.
"Q. On what deck does the stairway begin and on what deck does the stairway lead to?
"A. Well, this stairway led from the level of the cabins where the passengers are to the upper deck, to the deck above that.
"Q. What was the deck above that? Was that the Salon Deck?

"A. There is no Salon Deck there; it is only a small boat. It is a small ship. The bar was very small. A small salon. That is all there is.

"Q. Where was the bar located, on what deck?

"A. I don't know what the decks are called. These decks have no names at all.

"Q. Was the bar located on the deck where the stairway led to a deck below?

114 "Q. Was the bar located at the head of the stairs or the foot of the stairs?

"A. The bar was on top of the stairway.

"Q. What time of day was it that something happened to Mr. Kermarec; if you remember?

"A. It was in the evening, but I don't remember the time.

"Q. Can you give us your best recollection of what time it was?

"A. I cannot say. All I can say, it was after eating, so it was in the evening. It may have been five o'clock, six o'clock, but I cannot say anything definitely.

"Q. Do you happen to know where Mr. Kermarec was going just before something happened to him?

"A. He was going to the bar.

"Q. Was he using the stairway that you told us about before?

"A. Yes, he was using the stairway going to the bar.

"Q. Was he going up the stairs or down the stairs?

"A. He was going downstairs.

"Q. Can you describe the stairway?

"A. It was a stairway with about ten steps.

"Q. How wide was the stairway?

115 "A. I don't know. It would be a very vague information I would be giving you. It may be something like this—(indicating)

"Q. Three feet, four feet?

"A. Less than four feet, I should say.

"Q. What part of the ship was this stairway located in? Was it on the port side?

"A. Towards the front part of the ship.

"Q. Do you know where it was located with regard to the center of the ship or the port side of the starboard side?

"A. It was more to the port side.

"Q. Can you describe what was on the steps; what were the steps made of?

"A. The steps were covered by rubber and by a canvas.

"Q. Well, did you see what happened to Mr. Kermarec?

"A. All I did was to see him fall down.

"Q. Well, where were you with reference to the stairway when you say you saw him fall down?

"A. I was on the landing above him.

"Q. Had you come down a flight of stairs yourself to get to this landing?

"A. No, no, I was there on top.

"Q. Well, what I am trying to get at is whether
116 you came down steps to get to the landing or do you mean when you say 'landing' that you are at the head of the stairway?

"A. I was there holding to the banister, but I hadn't started to go down yet.

"Q. Then, were you on the top part of the stairway?

"A. Yes, I was.

"Q. Before you started to go down, is that what you mean?

"A. Yes, the other fellow went down first.

"Q. Did you watch the other fellow, Mr. Kermarec, go down the stairway?

"A. No, I didn't watch closely.

"Q. Well, did you observe him, did you see him?

"A. I saw, but I wasn't watching closely.

"Q. Did you see Mr. Kermarec start to go down the stairway?

"A. I cannot say.

"Q. Do you know whether Mr. Kermarec had gone down any part of the stairway before something happened?

"A. Oh, yes, he had already gone down some steps. He didn't fall down from the top.

"Q. I am trying to find out where he fell; how far from the top or how far from the bottom; if you know?

117 "A. It is not an easy question to answer.

"Q. Well, can you answer it?

"A. I cannot say, because it might not be accurate.

"Q. What is your best recollection as to whether he was near the top of the stairway, near the middle of the stairway, or towards the bottom of the stairway when something happened to him?

"A. I should say he was towards the bottom or the lower part of the stairway.

"Q. What did you observe happen to Mr. Kermarec?

"A. I only saw him fall down.

"Q. Can you describe how he fell?

"A. No, I cannot. I cannot say how he fell down. I saw him fall down, but I cannot give any more details about it. I don't know.

"Q. Was there any other person besides Mr. Kermarec and yourself on that stairway or near that stairway at the time that Mr. Kermarec fell?

"A. There was the bartender there, who was near.

"Q. What was the bartender's name?

"A. Rene Dufy.

"Q. Was Rene Dufy near the top of the stairway, was he in the middle of the stairway, or was he at the bottom of the stairway?

118 "A. He was on top of the stairway.

"Q. How far was Rene Dufy from you?

"A. Well—

"Q. About how far?

"A. He was in the neighborhood. I cannot say how far.

"Q. Can you give us some approximation in feet as to how far he was away from you?

"A. I don't know.

. . . . . .

"Q. How far was Mr. Kermarec away from you, in feet?

"A. Well, we—

"Q. Approximately how far away?

"A. First of all, I don't know the height of the steps. I don't know the height of the steps.

"Q. I didn't ask for the height of the steps. I am asking you to assume that Mr. Kermarec is walking down

119 the stairs and you are standing at the head of the stairway; I want to know how far away, approximately, you were from Mr. Kermarec just before he fell?

"A. Possibly one-half meters to two meters.

"The interpreter: It adds up to five to five to seven feet.

"Q. At that time and just before something happened to Mr. Kermarec, were you and Mr. Kermarec engaged in a conversation?

"A. Yes, we were engaged in conversation just before it happened.

"Q. Just before he fell, can you tell in what direction Mr. Kermarec was facing?

"A. I don't know.

"Q. Was Mr. Kermarec about to leave the ship before something happened to him?

"Mr. Rosow: I object to the form of the question.

"A. Yes, he was about to leave the ship.

"Q. Were you going to leave the ship with him?

"A. I was going to accompany him up to the gangway.

"Q. After Mr. Kermarec fell, what did you do for him?

120 "A. I took him to the infirmary.

. . . . . .

122 "Q. Now, you say that at the time Mr. Kermarec was using this stairway, that the stairway was covered with canvas?

"A. Yes.

"Q. Can you describe that canvas, namely, the width and the length of it?

"A. No, sir, I cannot.

"Q. Can you describe the canvas at all?

"A. No, I cannot give any more details about the canvas.

"Q. What did the canvas look like? What kind of canvas was it?

"A. It is—you know—what you usually find on ships. It is sailing cloth, sailing canvas.

"Q. Can you describe how the canvas was put on the steps?

"A. I have no idea how it was fastened to the steps. It was from the step to step. There was some canvas, that's all I can say.

"Q. Was the canvas fastened to the step?

123 "A. I imagine so, probably so. Yes, it was fastened."

Mr. Rosow: I move that that be stricken as not responsive, your Honor.

The Court: I will let the jury decide.

. . . . . .

"Q. Did the canvas cover all the steps?

"A. I don't know; I don't remember.

"Q. Well, did you see the particular step where Mr. Kermarec fell?

"A. No, I did not. I don't remember.

. . . . . .

124 "Q. Did the canvas fit over every step?

"A. Yes. I don't know how it was fastened. It was canvas. Probably the purpose was to prevent the steps from getting dirty. But I cannot describe in detail how it was.

"Q. Can you describe how the canvas was lying on the step?

"A. You realize it is not easy to describe a thing like that. It was just a canvas going from step to step. What else can I say?

"Q. Did you walk down any part of the steps after Mr. Kermarec fell?

"A. Yes, I did.

"Q. How soon after Mr. Kermarec fell did you walk down the steps?

"A. At once. As soon as I saw him fall down, I went down myself.

"Q. How long had that canvas been on those steps, that stairway, prior to November 24th, 1948; if you know?

"A. No, I cannot tell you. It is not, you know, my line of work. I cannot say.

125 "Q. How long had the ship been in at Pier 88 before the 24th of November, 1948?

"A. I am sorry, I don't know.

"Q. Well, had you used that stairway the day before, before November 24th, 1948?

"A. No, I didn't go down the day before. I didn't go down those stairs.

"Q. Do you know whether the canvas was on the stairway the day before?

"A. I don't know. It was a stairway I hardly ever used.

"Q. I show you these two photographs and ask you if these photographs correctly represent the stairway that we are talking about, as it looked and as it was on November 24th, 1948?

"A. I presume so.

"Q. I show you this photograph here and ask you if

that is a view of that stairway we were talking about, looking from the top down?

"Mr. Rosow: I object to the form of the question.

"Mr. O'Brien: I withdraw that last question.

"By Mr. O'Brien:

"Q. Those pictures that I showed you, do they correctly represent the stairway that we have been talking
126 about on board the SS. Oregon?

"Mr. Rosow: I object to the form of the question unless you state the time.

"Q. On November 24th, 1948.

"A. I recognize it. I can tell it is that stairway.

"Q. Is that how that stairway looked on November 24, 1948?

"A. Yes, it was the way it looked."

Mr. Garvey: That is Exhibit C, a view looking down the stairway.

Mr. Rosow: Both photographs were offered in evidence.

Mr. Garvey: The other one is looking up.

. . . . . .

127 "Q. Now, do you recall where it was that you met Mr. Kermarec on November 24th, 1948, for the first time?

"A. He came to see me in the infirmary.

"Q. Had he ever been on board the Oregon before?

"A. I don't think so. I don't remember whether he came aboard the Oregon before that time, but I hardly think so. I had not been on board the Oregon myself a long time—only a couple of trips.

"Q. Are you certain that you did not meet Mr. Kermarec at the gateman's office at the entrance to the pier?

"A. I didn't see him off the ship at all. I didn't see him on the pier at all.

"Q. Did you have a conversation with Mr. Kermarec before he came on board the ship?

"A. No, I had no talk with him before.

"Q. Did you know he was coming to visit you?

"A. He came—after I made his acquaintance, he came to see me every now and then. He came to see me
128 every now and then, but not aboard the Oregon—before, on other ships.

"Q. Will you tell me, sir, whether you knew he was coming to visit you before he came on board on the 24th of November 1948?

"A. No, I did not know.

"Q. Did you make any arrangement for him to visit you aboard the vessel?

"A. No, I had no arrangement.

"Q. When the vessel, the Oregon, is in New York, do you maintain any home in New York City?

"A. No, I have no home here in New York.

"Q. The ship is your home; is that correct, sir?

"A. Yes, that is correct.

"Q. You are permitted to have visitors on board the ship to see you; is that corerct?

"A. Well, he could come aboard. All he had to do was to get a pass.

"Q. Will you tell us the procedure by which a man desiring to visit you would come aboard the SS. Oregon?

"A. I presume that he asks for a pass at the entrance of the pier. I know that he had a pass.

"Q. Isn't it a fact that you obtained the pass
129 from the commander of the boat for him?

"A. I don't remember how this was arranged at the time. I know that now they get a pass from the ship herself, but the way it was at that time, I don't know.

"Q. The way it is now that you get the pass and bring you visitor on board to see you; is that correct?

"A. Well, yes, that is the way it is now. Of course, it is not a thing that you can do every day, but you can ask for a pass for your visitors and you usually get it. I see that all—you know—all the members of the crew aboard the ship, that is the way they do it.

"Q. I ask you again, are you certain that on November 24th, 1948, the same procedure was not in effect, the same procedure as now?

"A. Well, I don't remember. I don't know. It was my first trip to New York after the war. I don't remember exactly what was the procedure to get the passes. I don't remember. I know how it is today, but I don't know how it was then.

"Q. Do you remember the name of the second captain on board the Oregon on November 24th, 1948?

130 "A. I don't remember.

"Q. If I tell you that his name was Jean Audin, would that refresh your recollection?

"A. No, I don't remember. I could not even give you the name of the chief commander.

"Q. Now, on November 24th, 1948, did you have this pass in your possession?

"A. He had it, not me.

"Q. Did you see the pass that day?

"A. That is a very hard question to answer. So much time has gone by, I cannot remember.

"Q. I show you a photostat of this pass which is marked Defendant's Exhibit A for identification and ask you if that refreshes your recollection as to whether you had that pass in your possession?

"A. Yes, now I remember. It is me. I agree it's me. Now that I see it, I remember that it is me. That's my handwriting. That's my name. After such a long time, I couldn't remember any more.

"Q. Did you say that is your handwriting on there?"

For the record, the pass that was shown is a photostatic copy of Defendant's Exhibit B in evidence.

"Q. Did you say that is your handwriting on there?

131 "A. Yes, that's my handwriting.

"Q. Will you tell me what is your handwriting on there?

"A. The date is my handwriting; the name of Kermarec; and the name of Henry is my handwriting."

This is a photostatic copy of Defendant's Exhibit B which is in evidence.

"Q. Now that you have seen this pass marked Defendant's Exhibit A for identification, is your memory refreshed as to the manner in which you obtained this pass?

"A. I don't remember just now whether I went to the office or not. I don't remember any more whether I got that aboard the ship or off the pier. Perhaps it was aboard. I don't remember whether it was on board or on the pier.

"Q. May I ask you, sir, is it correct that you obtained this pass for Mr. Kermarec; is that correct?

"A. Yes, that was me.

"Q. May I direct your attention to the signature above the word 'Commander' and ask you if you recognize that signature or those initials?

"A. It is hardly legible. I cannot see the signature very well.

132 "Q. If I tell you that that is the signature of the second captain, Jean Audin, would that refresh your recollection as to the manner in which you got the pass?

"A. If it is the signature of the second commander, it means that I got the signature on board the ship, but I cannot say that that is the signature over there.

"Q. When you got this pass, did anyone tell you what it said?

"A. Nobody read the contents to me.

"Q. Did you at any time explain to Mr. Kermarec what the pass said?

"A. No, I did not.

"Q. Now, is it correct to say that you had this pass in your possession while Mr. Kermarec was aboard the vessel?

"A. Yes, that is correct; I had the pass.

"Q. Now, can you tell me whether Mr. Kermarec came to the infirmary alone when he came to visit you?

"A. It is quite possible that I had to go down to the pier, you know, to have him come in.

"Q. Do you remember whether you met Mr. Kermarec at the gateman's office?

133 "A. If I had the pass, I must have gone down myself to take him inside. I don't remember anything about it.

"Q. Will you tell us, please, how you and Mr. Kermarec came from the gatekeeper's office to get on board the vessel?

"A. There is a gangplank. That's the way we go on board.

"Q. Where was the gangway situated?

"A. It was on the—you know—towards the stern of the ship.

"Q. Can you describe to me the kind of gangway that was used on that day?

"A. I don't remember.

"Q. Did it have a canopy over it?

"A. I don't think so. It is usually only for the passengers that they are covered, but not for the crew.

"Q. Now, after you came across this gangplank, as you called it, onto the ship, can you tell me on what deck you were then?

"A. On the crewmen's deck.

"Q. Is that the deck where your room was?

"A. Yes, it is the same one.

"Q. Is that the same deck on which the infirmary was?

134 "A. The same one.

"Q. Isn't it true that you and Mr. Kermarec went together to your room?

"A. It must have been that way. He must have done it.

"Q. Did Mr. Kermarec give you a package to deliver in France for him?

"A. It is possible. I don't remember. It is possible.

"Q. It is difficult for you to remember exactly what happened on that day, isn't it, sir?

"A. Yes, it is hard. It is several years ago. Many thing I have forgotten now.

"Q. Do you recall that Mr. Kermarec had a sandwich or some food in your room?

"A. I don't believe he brought any sandwiches with him.

"Q. If I gave you that impression, I'm sorry. What I meant to ask you, sir, was, did you get a sandwich and some food for Mr. Kermarec and did you eat it in your room?

"A. Yes, that's okay. That's what we did.

. . . . . .

135 "Q. May I direct your attention to the stairway that we have been talking about. Would you be kind enough to tell me again what decks this stairway connected?

"A. It went from the passengers' deck to the smoking room.

. . . . . .

136 "Q. Where is the crew's deck with reference to the smoking room deck?

"A. The smoking room is above. Then come the passengers' cabins and then comes the crew's deck.

"Q. Will you tell me, sir, how long you stayed in your room before you went to the smoking room deck?

"A. It is not easy to answer that question.

"Q. Did Mr. Kermarec go with you from your room to the smoking room deck?

"A. Yes, we went together.

"Q. And how did you get to the smoking room deck?

"A. We took first the stairway used by the passengers and then we took the other stairway.

"Q. Did those stairways also have canvas on them?

"A. I cannot say.

"Q. Now, at the time of the accident, were you showing Mr. Kermarec how to get off the ship?

"A. Well, he went down ahead of me, and it was just at the time that he was supposed to leave the ship.

"Q. Was Mr. Kermarec leaving the ship in the
137 same manner in which he had come on board the ship?

"A. Yes, we are going to take the same route.

"Q. Didn't you tell us before that when you came onto the gangway, you were on the same deck as your cabin?

"A. Yes, I said that.

"Q. So that in order to come onto the ship, it was not necessary to use these stairs, was it?

"A. Well, he had to use the stairways afterwards, not to come on board, but afterwards.

"Q. When you came to the stairway, did you tell Mr. Kermarec 'We go down here,' or words to that effect?

"A. I don't remember.

"Q. Well, Mr. Kermarec didn't know the way how to get off the ship himself, did he?

"A. Oh yes, he would have known. It is a small ship.

"Q. But nevertheless, you were going with him to go off the ship; is that correct?

A. Yes, I would have gone with him.

. . . . . .

139 "Q. Now, on November 24th, 1948, did this canvas cover the entire width of each step?

"A. Well—

"Q. Do you know what I mean by "width"?

"A. I know very well what you mean, but I don't remember. You are asking too much of me.

"Q. Do you remember whether or not this canvas was fastened at the back of each step or at any part of the step?

"A. I am sure the canvas was fastened, but I don't know how.

"Q. Will you tell us what makes you sure this
140 canvas was fastened?

"A. Well, I think of that because if it was not fastened to those steps, it would not have remained there.

"Q. Can you describe to us the type of fastening that was used?

"A. No, I cannot.

"Q. Can you describe the thickness of this canvas?

"A. No, I cannot.

"Q. Can you describe the color?

"A. Yes, I can say it was just a white canvas.

"Q. Would you say it is like the canvas that painters use to cover up furniture when they are painting?

"A. I don't know for what purposes this canvas is used. All I know is that on board the ships, they call it 'sailing canvas.'

"Q. What was the condition of this canvas? Was it clean or dirty?

"A. It was clean.

"Q. Did you see the step on which Mr. Kermarec fell?

"A. No, no, I didn't see it.

"Q. Do you know that Mr. Kermarec has testified
141 that he fell because the canvas was not fastened on the fourth step from the bottom?

"A. I didn't know anything about that.

"Q. You did not inspect the stairs after Mr. Kermarec fell, did you?

"A. No, no, I didn't examine it. When he fell down, I helped him.

. . . . . .

147 "Q. Now, how long have you worked for this company?

"A. Since 1925.

"Q. And you intend to work for this company into the future, do you not?

148 "A. I have three more years to go to get a pension.

"Q. You were brought here this afternoon by an employee of this company; is that correct?

"A. Yes, yes.

"Q. Did anyone serve you with a subpoena to testify today?

"A. No, I didn't get any subpoena. I was just called up.

* * * * * * * * * * *

149 "Q. Was the canvas tightly fitted to each step?

"A. I believe that the canvas was fast to the steps.

"Q. And standing at the top of the steps, the canvas looked smooth and normal to you; is that correct?

"A. It looked quite normal and smooth.

"Q. Each and every step; is that right?

"A. Yes, all of them.

"Q. Did you see Mr. Kermarec fall?

"A. Yes, I did.

150 "Q. Was he walking down the stairs at the time?

"A. Yes.

"Q. Was he looking in front of him as he walked down the stairs?

"A. I suppose so. When you go down, you know, a stairway, you usually look in front of you.

"Q. You were behind him, isn't that right, sir?

"A. Yes, I was behind him. On top.

"Q. So you could see how he was walking down the stairs, isn't that right?

"A. Yes, I could see that. He was just going down like everyone else, going down a flight of steps.

"Q. As he was going down the flight of steps, he was looking straight ahead of him and holding onto the railing; is that correct?

"A. Yes, certainly, probably he was holding.

"Q. As Mr. Kermarec went down the stairs, did you see him holding onto the railing?

"A. I presume only that he was holding onto the rail.

"Q. Well, do you say that he was holding on or he was not holding on?

"A. I can't say neither thing, one or the other.

"Q. You mean you don't recall whether he was

151 holding on or not?

"A. The truth is, I don't remember.

"Q. Did you see Mr. Kermarec fall?

"A. Yes.

"Q. Can you tell us on which step he fell?

"A. No, I cannot.

"Q. Can you describe what happened to Mr. Kermarec when he fell?

"A. All I can say is he fell down to the bottom of the stairway.

"Q. Did you see him strike his hip or his side or his leg against any part of the stairway or the rail?

"A. No, I didn't see anything. I didn't see him strike against anything.

"Q. What is the distance from the top step to the bottom landing?

"A. I don't know how many steps there are. I don't know the distance.

"Q. Well, can you approximate it for us, the distance from the top to the bottom?

"A. Perhaps two and a half meters.

. . . . . .

154 **Deposition of George Bourdon**

"Q. What is your name?

155 A. George Bourdon.

. . . . . .

159 "Q. Would you describe that stairway as the way it was that day that you saw Mr. Kermarec at the foot of it?

"A. I can say that the stairway was clean, that there was a canvas on it. It was covered by a white canvas.

"Q. Do you know who put that canvas on that stairway?

"A. It was I.

"Q. What was your work on the ship?

"A. I was on the deck and in the smoking room.

"Q. Were you a porter or just what was your title if you had any?

"A. No, I was a steward.

. . . . . .

160 "Q. When the ship was in port, what work, if anything, did you have to do on that stairway?

"A. In connection with the stairway, I had to clean it and put canvas on it.

"Q. Had you cleaned the stairway before the time you saw Mr. Kermarec at the foot of the stairway?

"A. Yes.

"Q. When had you done that?

"A. In the morning, and the accident took place in the afternoon.

• • • • • • • • • • • •

161 "Q. How much of the stairs was covered with the canvas?

162 "A. All. You can have a look at the picture (indicating). Just a small margin, maybe not covered. I suggest that you have a look at the picture.

"Q. When you say 'a small margin,' what parts of the steps were not covered?

"A. Both sides; the small margin that is not covered on both sides of the stairway.

"Q. Did you do anything to fasten the canvas on the stairway?

"A. Yes, I used tacks.

"Q. Where did you put the tacks?

"A. Near the edge.

"Q. Edge of what?

"A. Of the canvas.

"Q. I show you this photograph that has been marked Defendant's Exhibit B for identification, with initials 'H.M.', dated 5/3/55, on an examination of another witness, and ask you if you recognize that photograph, Mr. Bourdon (handing document to the witness).

"A. Yes.

"Q. What is that a photograph of?

"A. This is a picture of the stairway and of the steps."

163 It was then marked for identification:

"Q. Mr. Bourdon, will you mark by an 'X' approximately where you say you used tacks to tack down the canvas, in just one place?

"A. Here."

May I show that to the jury, your Honor.

"Q. This is a view, of course, looking down the stairway, is it not?

"A. Yes.

"Q. I show you this photograph, Mr. Bourdon, and ask

you if that is a photograph of the same stairway, looking up?

"A. Exactly, it is the same."

Then it was marked for identification.

"Q. Do those photographs correctly and fairly represent the condition and appearance of that stairway as the stairway appeared on the day that you saw Mr. Kermarec at the foot of it?

"A. Exactly, yes.

"Q. Did you yourself use that stairway between the time you washed it and the time you saw Mr. Kermarec?

"A. Oh, yes, of course, we know how to go down those steps.

"Q. I am asking, did you use it between the time
164 you washed it and the time you saw Mr. Kermarec?

"A. Oh, yes.

"Q. How did the stairway look to you?

"A. In order.

. . . . . .

Then Mr. Rosow cross-examined.

165 Mr. Rosow: "Q. Mr. Bourdon, did you see Mr. Kermarec fall?

"A. No.

. . . . . .

166 "Q. When had the ship arrived in New York, in port, before his accident?

"A. I believe it was the day before.

"Q. Is it correct that this was the first time you had sailed on the Oregon?

"A. Yes.

"Q. Will you tell me when you were required to put down the canvas on the stairs?

"A. It was expected of me to do this work as soon as the passengers leave the ship.

"Q. Did the passengers leave the ship the same day the vessel arrived in port?

167 "A. Yes.

"Q. Then, it is not a fact that you put down the canvas the day before the accident?

"A. The canvas was put the day before the accident once, and then the following day the stairway was cleaned and the canvas was put on once more.

"Q. Do you mean that you picked up the canvas and cleaned the steps and then put the canvas down again?

"A. Exactly.

• • • • • • • • • • •

168 "Q. Tell me if I correctly understand your testimony. You put the canvas down the first day the vessel arrived and then, on the second day, which was the day of the accident, you picked it up and put it down again, and then when the vessel left, you picked it up; is that correct?

"A. The last time, when the ship left, I just took it away. I didn't put it back again. The rest of what you said is correct.

"Q. But you did not pick it up and clean the stairs the day after the accident; is that right?

"A. No. Only when the ship sailed, for the passengers coming aboard.

"Q. Did you clean the stairs on the first day before
169 you put the canvas down?

"A. Yes. Every time I cleaned it, I put the canvas on.

"Q. On the morning of November 24, 1948, did you inspect the stairs before you picked up the canvas?

"A. I didn't examine the stairway. There is nothing to be examined there. It is routine. It's always the same kind of work.

"Q. Were the stairs clean before you picked up the canvas to clean them on the second day?

"A. Not quite clean, somewhat dirty, from the crew of the ship.

"Q. So it was necessary for you, on the day after arrival, to pick up the canvas, clean the stairs, and put the canvas down again; is that correct?

"A. Yes, it was necessary.

"Q. What time, on November 24, 1948, did you clean the stairs and replace the canvas?

"A. Eight o'clock in the morning.

"Q. Did you do this because of an order from one of the officers of the ship?

"A. No, nobody told me to do that. That is routine work. That was my job.

"Q. Is it routine work for you to pick up the
170 canvas every day the vessel is in port and clean the stairs, and then replace the canvas?

"A. Yes.

"Q. Can you tell us what is the reason, then, that you did not clean the stairs and pick up the canvas on the days after the accident?

"A. Well, it was my job, but it is not a daily job. It is not a job that I have to do every day. If the place looks clean, then you can leave it as it is for a number of days.

"Q. Was there some special reason that you cleaned it and picked it up on the day-after-arrival day, November 24th?

"A. No.

"Q. Will you describe this canvas to me?

"A. It was a rather thick sort of canvas. It is not just a regular cloth; it's canvas, it's thick.

"Q. What is the thickness of it?

"A. Slightly thicker than this piece of paper."

The witness indicated a paper match cover which was marked Defendant's Exhibit C for identification.

"Mr. Rosow: Indicating a paper match cover.
171 "The Witness: It is what they call sailing cloth.

"Mr. Garvey: May we have the match cover marked for identification as Defendant's Exhibit C, the thing that the witness said is something like the thickness of the canvas, but the canvas is a little thicker?"

Mr. Garvey: Are you offering it?

Mr. Rosow: At this time I would like to have this offered in evidence.

(Marked Plaintiff's Exhibit 7.)

Mr. Rosow: "Q. Mr. Bourdon, how many steps were there in this flight of stairs?

"A. I don't know. You had better look at the picture.

"Q. What were the stairs made out of?

"A. They were covered with rubber.

"Q. What were the steps, themselves, made out of?

"A. They were entirely of rubber. On board ships there are many things that are entirely of rubber, excepting the railing where you hold on so as not to fall; that is wood. But the steps were made of rubber.

"Q. You say the steps were covered with rubber; is that correct?

"A. Everywhere there was rubber, entirely made
172 out of rubber.

"Q. How was this rubber fastened to the step?

"A. It is glued on.

"Q. Will you describe to me the nose of the step; by that I mean the tip of the step?

"A. It is rubber even underneath, everywhere rubber.

"Q. You mean the riser part of the step is made of rubber also; is that right?

"A. Yes. The front part is rubber, going like this, every step, everything is rubber.

"Q. Was there any covering on top of this rubber underneath the canvas?

"A. No; immediately touching one another, rubber and canvas.

"Q. So that where you tacked the canvas, the tack went into rubber; is that correct?

"A. Yes, exactly.

"Q. How long was this canvas?

"A. I don't know. It's a very long time.

"Q. How wide was the canvas?

"A. The width (indicating).

"Mr. Rosow: Indicating two feet.

"The Witness: Not quite a yard.

173 "By Mr. Rosow:

"Q. How many tacks did you put into each step?

"A. One on each side, on either side of every step.

"Q. What was the size of the tack that you used?

"A. Just small, like this (indicating).

"Mr. Rosow: Let him draw it on a sheet of paper and we can mark it for identification.

"(Witness draws.)

"The Witness: The head—you can't see it here—but the head is flat, fairly big and flat.

"Mr. Rosow: Mark that as a drawing of what the witness says the tack looked like, except that the top was flat.

"Mr. Garvey: Let us make that a defendant's exhibit.

"Mr. Rosow: All right."

At that time the exhibit was marked and it is now Plaintiff's Exhibit 5.

"The Witness: It was of red copper, the point.

"Q. I show you Defendant's Exhibit D for identification, and ask you to show me, with a pencil mark, that portion of the tack which went into the step.

"A. Here (indicating).

"Mr. Garvey: Do you mean above or below the
174 line?

"The Witness: This part is in the step. I am erasing this because this looks round; it is really flat.

"Q. In other words, everything that is below this line that you have drawn was in the step?

"A. In the rubber of the step.

"Q. And through the canvas?

"A. Through the canvas, to fasten the canvas through the rubber.

"Q. And that particular black line you have drawn on top of the line represents the flat head of the tack; is that right?

"A. Yes, that is it.

"Q. Was the head of the tack then above the canvas?

"A. Yes, it is so. But after you have driven it in, everything is flush.

"Q. How did you drive in this tack?

"A. With a small hammer. You have to use a small hammer, but underneath the rubber the steps are made of wood.

"Q. What is the thickness of the rubber?

"A. You are asking too much. I don't know what the thickness of the rubber is.

175 "Q. But you do know that this tack went through the canvas, through the rubber, into the wood; is that right?

"A. Yes, that is so. The rubber is not so very thick. Really, the rubber is there just for the aspect, to make it nice.

"Q. Is the rubber smooth?

"Q. Is it hard or soft?

"A. The rubber is more or less like this table looks, the same aspect, after it is glued, absolutely flush.

"Q. Is the rubber hard or soft?

"A. It is hard rubber.

"Q. Will you describe to me the manner in which you took these tacks out when you went to clean the stairs?

"A. It is not hard at all. You just get hold of the canvas and then the tacks come out by themselves.

"Q. After you picked up the canvas, what do you do with it?

"A. Well, you know, you re-arrange the canvas after you have taken it out.

"Q. After you took it out on the morning of the accident, did you examine the steps?

176 "A. Yes, but there was nothing particular. They were clean.

"Q. Were they in good condition?

"A. Oh, yes.

"Q. There were no holes in the steps, were there?

"A. No, no.

"Q. Did you fasten the canvas to the step in any other manner besides that which you have already told us, namely, two tacks in each step?

"A. No, no, nothing beyond that."

Again may I show the jury where the tack marks are indicated on either side.

"Q. Did you put the canvas down yourself, on the morning of the accident?

"A. Yes, yes.

"Q. Where did you start? At the top or at the bottom?

"A. Always on top, going down.

"Q. Do you start immediately at the step on the deck, or do you start further back from the steps?

"A. A little bit further back before it begins to go down, there is a certain margin.

"Q. How much of the canvas do you place on the deck before you get to the step?

177 "A. About a yard or a meter.

"Q. Describe to me the manner in which you lay this canvas on the steps.

"A. You just put the canvas on the steps and then on each side you drive the tacks in.

"Q. Then, I suppose you roll it down the steps and fasten the canvas to each step in turn, is that right?

"A. Yes, exactly so.

"Q. Then, when you get to the deck below, was there any canvas stretched out onto the deck?

"A. Yes, there is also there about a yard or a meter—you can see that from the photo.

"Q. Each step, if I understand you correctly, was completely smooth from the back to the front, is that correct?

"A. Yes, everywhere, smooth.

"Q. Before you put the canvas on, the rubber on the step was completely smooth from the back to the front, is that right?

"A. Yes, yes.

"Q. On each step?

"A. Yes.

"Q. You are certain that there was no raised por-
178 tion at the front of each step?

"A. No, I am sure there was nothing sticking out.

"Q. The place that you marked on the picture before is where you put each tack, is that right?

"A. Yes, that is correct.

"Q. Can you tell me how much of each step was not covered by the canvas on each side of the step?

"A. First of all, I must say that I can't remember very well after six years. My impression is that the width of this margin was about this (indicating).

"Mr. Garvey: About two and a half inches.

"Q. And that would be on each side of the step, is that right?

"A. Yes, sir, the same width.

. . . . . .

179 "Q. During the day, from the time that you put the canvas down, can you tell us how many people walked up and down that flight of stairs?

"A. I can't. I wasn't there to watch people going up and down the stairs.

"Q. Will you tell us what you meant before when you said 'We know how to go down the steps'?

"A. I meant to say we are accustomed to it. Perhaps we go up and down the stairs a hundred times a day.

"Q. Is there something special about this flight of stairs that requires special knowledge by a seaman?

180 "A. No, it is a stairway. This man who fell down—well, it is a stupid accident. He might have gone down two hundred times and nothing happened, and that time he simply fell down.

"Q. Mr. Bourdon, have you, before today, discussed this accident with anybody?

"A. No, luckily, I have not discussed this.

"Q. Did you ever see the photographs which you identified before, prior to today?

"A. Yes, aboard the Oregon. Apart from that, I was there when they took the pictures.

"Q. How long have you been employed by the defendant Compagnie Generale Transatlantique?

"A. Since 1925; thirty-one years.

. . . . . .

182 **Deposition of Rene Dufy**

"Q. What is your name?

"A. Rene Dufy.

. . . . . .

183 "Q. Were you on the SS. Oregon on November 24, 1948?

"A. Yes.

"Q. Was that moored at the French Line pier, Pier 88?

"A. Yes.

"Q. What was your job at that time on the SS. Oregon?

"A. I was barman and taking care of the smoking room, working there.

"Q. What was the title—was it steward?

"A. The title was barman, but on the small ship, that includes certain extra work. The exact name in France is 'garcon du bar.'

"Q. Was the SS. Oregon a small ship?

"A. Yes.

184 "Q. Do you remember when that ship got into port, was it the day of the accident, or the day before?

"A. I believe it was the day before.

"Q. Did you meet Mr. Kermarec, the plaintiff, the man who is suing in this case, sometime on the day of November 24, 1948?

"A. I had never seen him before. That was the first and only time that I ever saw him.

"Q. Where were you when you first saw him?

"A. I was on the landing on the stair.

"Q. Do you remember what time the accident happened, about what time?

"A. Not exactly; it was in the afternoon, between four and five o'clock, I would say.

"Q. Do you know whether Mr. Kermarec had anything to drink that day or not?

"A. I don't know. I know he ate aboard the ship, but I don't know whether he had anything to drink.

"Q. Did he come into the bar that afternoon?

"A. Yes, before the ship left, he came to the bar with Mr. Henry.

"Q. How long was he in the bar?

"A. Three or four minutes. He was visting the
185 ship.

"Q. Did he have anything to drink while he was in the bar?

"A. I prepared something for him and Mr. Henry, but I don't even know whether it was wine, beer, or anything else.

"Q. Did you leave the bar with Mr. Kermarec and Mr. Henry, or did you go out of the bar before them or after them?

"A. He left the bar before me—they left the bar.

"Q. About how long after they left the bar, did you leave the bar?

"A. Two minutes.

"Q. After leaving the bar, did you see Mr. Kermarec and Mr. Henry.

"A. Yes, I saw them, they were talking to each other on the landing.

"Q. Did you go to where they were?

"A. No, I was on the other side of the landing.

"Q. After seeing the two, Mr. Henry and Mr. Kermarec, talking, tell us what you next knew about Mr. Kermarec.

"A. I saw nothing else, just when he was leaving, and while he was leaving, I saw him.

186 "Q. What did you see about him while he was leaving?

"A. I saw him go down. He said goodbye to Mr. Henry. Then I looked up, and I saw that he was falling backwards.

He seemed to have a brain concussion or something like that, but I don't know.

"Q. Where was he when you saw him falling? Was he on the stairway, was he down at the bottom of the landing, or where was he?

"A. When he fell down, he was perhaps on the third or fourth step, but I don't remember exactly; second, third, fourth. I saw it afterwards, when he was already lying down.

"Q. Did you go down the stairway, after he had fallen?

"A. Yes, I went down. He got up.

"Q. When you went down the stairway, what did you notice about the stairway?

"Mr. Rosow: I object to the form of the question.

"Q. What, if anything did you notice?

"A. No, I didn't notice anything.

"Q. Did you know what the stairway was covered with?

"A. There was canvas one it. In the passageway
187 there was a cover.

"Q. When you use the word 'passageway,' do you mean the stairway?

"A. Yes, the passageway on the stairs.

"Q. Was there any railing on either side of the stairway?

"A. Yes, there are railings on both sides to hold onto.

"Q. Do you know whether that canvas was fastened in any way or not?

"A. Yes, it was fastened, it was nailed to the stairs.

"Q. Had you had anything to do with putting that canvas down before Mr. Kermarec met with his accident?

"A. Yes, I had something, because we usually put the canvas, both of us, Mr. Bourdon and myself. It was a job we had in common.

"Q. Had you walked up and down that stairway that day before the accident happened?

"A. Yes, before the accident; after the accident, I went up and down that stairway.

"Q. Did you notice whether the canvas slipped at any time on any of the steps as you walked up and down the stairway that day?

188 "A. No, I didn't notice any such thing. The canvas was tight.

"Q. After Mr. Kermarec had fallen, did you see him again that night or the next day?

"A. Never.

"Q. Had you ever met Mr. Kermarec before the day of the accident?

"A. No, never.

"Q. At the time that Mr. Kermarec was falling, where was Mr. Henry?

"A. He was on the landing, on top of the landing.

"Q. When you say the top of the landing, were you at the same landing as Mr. Henry, or the landing down below when Mr. Kermarec fell?

"A. I was on the same landing as Mr. Henry.

* * * * * * * * * * *

189 "Q. You were in the same department with Mr. Bourdon, is that right?

"A. Yes.

"Q. Do you say it was your job, and Mr. Bourdon's job to put the canvas down?

"A. Yes, both of us.

"Q. When this vessel arrived in New York, I believe you told us the ship arrived the day before the accident, is that correct?

"A. I believe so. I don't remembr exactly.

190 "Q. Do you recall on arrival day whether or not you put the canvas down?

"A. Yes, on arriva', as soon as the ship arrived, I put it.

"Q. Was that done before the passengers left the vessel?

"A. After the passengers left.

"Q. Will you tell me whether or not you or Mr. Bourdon did anything to the stairs before putting the canvas down?

"A. We washed the stairs first, and we cleaned it, and then we put on the canvas.

"Q. After washing it, I suppose you dried it up, and then put the canvas, is that right?

"A. It is always dry.

"Q. The canvas was there to keep the steps clean, is that right?

"A. That's correct.

"Q. You didn't use this canvas while passengers were on board, did you?

"A. No, no, we put it on afterwards.

"Q. The day of the accident, do you recall whether or not you picked up the canvas, and cleaned the stairs again, and then put the canvas down again?

191 "A. I don't remember any more. It is long ago.

"Q. Who was your superior officer on board this ship?

"A. I don't remember any more, it is such a long time ago.

"Q. I don't particularly care about the man's name. Can you tell me what his rating was?

"A. His title was Maitre d'Hotel.

"Q. Would that be the equivalent of the chief steward?

"A. That is the same thing.

"Q. Is he the officer who told you to put the canvas down?

"A. He doesn't have to tell us that; that is our work.

"Q. You know that as soon as the passengers had left the ship, the canvas had to be put on these stairs; is that right?

"A. Yes, I knew that.

"Q. Were you under instructions as to the manner in which you should fasten the canvas to the steps?

"A. All the instructions are that the canvas cover must be tight, that you don't have any trouble with it.

"Q. The canvas was nailed to the steps, is that

192 right?

"A. Yes, it was nailed to the steps with nails with a big head so as to prevent the canvas from slipping."

Your Honor, I move at this time, as I did on the record, that the answer be stricken, all after the word "Yes."

The question was:

"The canvas was nailed to the steps, is that right?

"A. Yes, it was nailed to the steps with nails with a big head so as to prevent the canvas from slipping."

The Court: I will allow it.

Mr. Rosow: "Q. Do you remember how many nails you put in each step?

"A. I don't remember how many. I know there are nails, but how many, I don't know. Two or three.

"Q. If I tell you that Mr. Bourdon, when his testimony was taken, told us that he used two copper tacks, would that refresh your recollection?

"A. I still don't remember how many nails there were. It was he who nailed down the canvas.

"Q. Is it also true, then that you don't know
193 the position of each of the tacks in the steps?

"A. On principle, they are always put at the edge of the canvas, so that it doesn't separate itself from the steps.

"Q. Were these tacks placed at the nose or the front of each step?

"A. They were put on the sides, from below.

"Q. Do I understand correctly, Mr. Dufy, that there was no tack on the step itself, on the top of the step; is that what you are saying?

"A. There were no nails on the steps themselves nor on the edge.

"Q. When I speak of the step, Mr. Dufy, just so I understand what you are saying, I am speaking about that portion on which the foot rests.

"A. Yes, I understand that.

"Q. Then are you telling me, sir, that on that portion of the step where your foot rests, there was no tack?

"A. On each side, at the edge of each side, there were tacks. On the steps where people put their feet on, on the sides, towards the edge, there were tacks. And then to keep the canvas in place, there are similar tacks driven in from below.

194 "Q. So is it now your testimony, sir—

"Mr. Garvey: I object to the form of your question.

"Q. Are you telling us that there are more than two tacks for each step?

"A. Well, a step consists not only of the top part—

"Mr. Garvey: The question is: Are you saying that there were more than two tacks put into each step?

"The Witness: I don't remember how many there were, but there were more than two, if you consider a step as a whole. It is a long time ago.

"Q. If I tell you that on May 17, 1955, Mr. Bourdon was asked:

"'Question: How many tacks did you put into each step'

"And he said: 'One on each side, on either side of every step.'

"Do you disagree with Mr. Bourdon's statement?

"A. I believe there were more than two tacks.

"Q. Do you accurately remember, sir, how many tacks there were in the step?

"A. I don't remember.

"Q. What were these steps made out of?

195 "A. Made out of rubber.

"Q. Was this rubber a hard rubber, or a soft rubber?

"A. Rather hard.

"Q. Underneath the rubber, was there wood or other substance?

"A. Everywhere rubber; there was nothing else.

"Q. What I mean by that is this, Mr. Dufy: Was this stairway a wooden stairway covered with rubber steps; is that what you are saying?

"A. The whole stairway was made out of rubber; the wood is only on the sides. But possible there may be some wood also within the rubber, but I don't know.

"Q. Do you know the thickness of this rubber?

"A. I don't know.

"Q. Can you tell me the thickness of the canvas that was used?

"A. It was a thin canvas. It was a regular sailing cloth that is not very thick.

"Q. When you speak of sailing cloth, is that what you would normally call duck cloth, if you know?

"A. I don't know. It is the usual canvas used aboard ships. It is washable kind of material.

196 "Q. And it fits the stairs snugly, does it not?

"A. Very well. It is a supple kind of fabric.

"Q. To go back to when this canvas was placed there, do you recall, and can you tell us exactly when you and Bourdon put the canvas there prior to the accident?

"A. I don't remember. All I can say is that the canvas was put on as soon as the passengers left.

"Q. But you do say that Mr. Bourdon put the tacks into the canvas, is that right?

"A. Yes, of course, to keep the canvas in place.

"Q. Were you working with him when he put the nails or tacks in place?

"A. Well, yes, when he was working on the top of the

stairs, I was working at the foot of the stairs, and the other way around.

"Q. After Mr. Kermarec fell, you told us you walked down these stairs; is that right?

"A. Yes, that's correct.

"Q. Did you inspect this canvas when you walked upon it?

"A. Yes, I looked at it, but I didn't see anything particular about it.

"Q. No, I asked you, Did you inspect this canvas?

197 "A. No, I didn't inspect the canvas, because there was nothing out of order.

"Q. So when you looked at the canvas, do you mean that as you walked down you looked at it? Is that right?

"A. I looked at it when I went upstairs again to work.

"Q. How long after the accident was that?

"A. It was almost the same moment, because he was taken away from the place of the accident almost at once by the nurse.

"Q. As a matter of fact, you and Henry both took Mr. Kermarec to the ship's hospital?

"A. Oh, no, I didn't take him to the hospital. He got up; he, Mr. Kermarec got up.

"Q. Did you pay any particular attention to the fourth step from the bottom when you walked up the stairs?

"A. I didn't inspect it.

"Q. You didn't observe particularly whether a tack was missing on the fourth step, did you?

"A. Everything was the same as before; everything was intact.

"Q. I ask you, did you particularly notice the

198 fourth step from the bottom as to whether all the tacks were in place?

"A. No, I didn't notice anything of the kind.

"Q. So if a tack was missing, you didn't notice it when you walked up the stairs; is that not right?

"A. If there had been one tack missing, I would have noticed it, because the canvas would have slipped.

"Q. How long did it take you to walk up the steps?

"A. A very short time. There are about thirteen or fourteen steps; I should say two minutes.

"Q. Two minutes or one minute.

"A. Two or three minutes. Can't be any longer.

"Q. It would take you two or three minutes to walk up thirteen steps?

"A. Well, I say two minutes. I went very leisurely upstairs. Maybe in one minute.

"Q. Did you at the time you were walking up the stairs stop and look closely at each step?

"A. I looked at the steps, but I didn't notice anything out of order.

"Q. You made no report to anyone about the conditions of the steps after Mr. Kermarec's accident? Is that right?

199 "A. I don't think so; I can't remember.

"Q. When you walked up the steps, you looked at the steps as you were walking up; is that right?

"A. I just was looking like this normally, going up the stairs.

"Q. When you said 'looking like this,' you indicated with your head straight in front of you; is that correct?

"A. Yes, of course, looking in front of me.

"Q. In other words, you were looking in front of you as you were walking up the stairs; is that right, sir?

"A. Yes, it is correct.

"Q. Which side of the stairway were you walking on, sir?

"A. That stairway is meant really only for one person, so you can hardly say whether you are on the right or the left side.

"Q. Were you holding onto the handrail as you went up the stairs?

"A. Yes, I was holding onto the railing.

"Q. Which railing were you holding to?

"A. Usually when you go up, you hold onto both rails.

"Q. How wide is the stairway?

200 "Q. About one meter or three and a half feet.

"Q. Was Mr. Bourdon present at the time Mr. Kermarec fell?

"A. I cannot say that with certainty, but I believe he was present.

"Q. Do you know where he was?

"A. I don't remember exactly, it is very difficult to remember, it is a longtime ago. I cannot say.

"Q. Mr. Dufy, I am not asking you to guess about these things. If you don't know, you can tell us you don't know.

"A. I will take note of that.

"Q. This accident happened quite some time ago, didn't it, sir?

"A. Oh, yes, seven or eight years ago.

"Q. Were you present at the head of the stairway when Mr. Kermarec started to go down the stairs?

"A. I was on the side of the landing.

• • • • • • • • • • •

201 "Q. How long have you been employed by the defendant Compagnie Generale?

"A. Twenty-three years.

"Q. You are presently employed by the same company, is that right?

"A. Yes, sir.

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202 "Q. To get back to the stairway for a moment, was the rubber on the stairway smooth?

"A. Yes, it was smooth.

"Q. Was there anything at the nose of the step, any steel or wood or metal?

"A. No, there was nothing. Everything had been taken off just for the purpose of having the rubber there.

"Q. I am asking now about the stairway on which Mr. Kermarec fell, you understand that, don't you?

"A. Yes.

"Q. It is your testimony that the rubber on the step was smooth, and that there was no raised portion at the nose, is that correct?

203 "A. No, no, there was no such places jutting out. Exactly for that purpose, the rubber was put on.

"Q. I show you this photograph, marked Defendant's Exhibit A for identification, dated May 17, 1955"—I am referring to defendant's Exhibit C, which I showed to the witness—"and ask you if that refreshes your recollection as to what the steps looked like.

"A. I recognize the stairway.

"Q. Now that you have seen the photograph, do you still testify that the nose of this step was smooth, and that there was no raised portion at the nose?

"A. It was white, everything was looking white before there was that rubber you just mentioned of the places jutting out, but it was done away with.

"Q. Do you say then that this photograph doesn't show the stairway, as it was on the day of Mr. Kermarec's accident?

"A. All I can remember that the stairway looked absolutely white, it looked white the day of the accident.

"Q. You mean that the canvas covered the entire step?

"A. What I mean to say is this: That the sides
204 were the same as these are represented here, the rest was white, and that there is rubber underneath. I don't remember any more the exact color.

"Q. I am not asking you about the color, sir. I am asking you whether or not you can tell me if this picture is a true representation of the stairway, as it was on the day that Mr. Kermarec got hurt.

"A. It is the same stairway. As far as I can see, it is the same stairway.

"Q. After looking at the photograph, this length of time, do you still tell me that there was no raised portion at the nose of the step?

"A. I still maintain there was nothing jutting out on the nose, which I call the edge.

"Q. I show you again this photograph"—which is now Defendant's Exhibit C"—and direct your attention to that portion of the step between the canvas and the bannister at the edge or the nose of the step. Can you tell me, sir, what material that is constructed of?

"A. I don't remember any more. I believe it was rubber. I know that something had been changed to those steps, but I don't remember now whether this happened before the accident, or after the accident. Before,
205 there had been some copper there, but then it was changed. Whether it happened before or after the accident, I don't know."

Dropping down a few questions:

"Q. Do you recall specifically when the stairs were changed, as you have told us?

"A. No, I don't remember. We used to wash the steps and stairway, but then we never thought of it any more.

"Q. So that after looking at this photograph, and having your attention directed to that portion of the photograph between the bannister and the canvas at the edge of the step, you cannot tell me whether or not this was a raised portion; is that correct?

"A. I do remember there were no things outstanding, nothing jutting out on the spots that you are showing me.

"Q. Do you remember, sir, that the stairway looked exactly as it looks in this photograph on the day of the accident?

"A. Yes, that I remember; it is the same stairway. There is no doubt about it.

"Q. When you speak of something 'jutting out,' you mean something that doesn't belong on the step,
206 is that right?

"A. I didn't notice anything foreign to the steps.

"Q. I am not speaking of anything foreign on the steps. I am merely directing your attention to this photograph as it is, and ask you to tell me whether this portion of the step, which I have directed your attention to before, is level with the back of the step, or is raised from the level of the back of the step.

"A. No, no, I can't remember that it is raised.

"Q. When you came to the landing, do you recall whether or not you called to Henry?

"A. I don't remember having called him, having called Mr. Henry.

"Q. Do you recall when this canvas was taken up from the steps after the accident?

"A. The following day, before the ship sailed.

"Q. Did you take it up before the passengers came on board?

"A. Yes, before.

"Q. Can you tell me, sir, the reason that you would have this canvas down when there were no passengers on board?

"A. In order not to make it dirty, so that it is
207 clean when the ship sails.

"Q. Is this a stairway on which freight was carried, or is this a passenger stairway?

"A. The stairway was meant only for us, for the crew and for the passengers, but not for goods.

"Q. During the course of one day, can you tell me about

how many times you would use that stairway going up and down, when the vessel was in port?

"A. About ten times.

"Q. Would other crew members use the same stairway?

"A. Not every member or the crew, mostly only myself and Bourdon, because we had work there."

And that was all.

Mr. Garvey: That is the defendant's case, your Honor.

Mr. Rosow: Plaintiff rests, your Honor.

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Colloquy Between the Court and Counsel

The Court: Gentlemen, I am returning the requests to charge and I can tell you that what I am going to do is to give the charge that I gave the last time except
208 that I am changing my mind about contributory negligence. I am not going to charge the rule of comparative negligence but I am going to charge the rule of contributory negligence. But in all other respects it is the same.

I do not believe that the Pope and Talbot case applies here, although the last time I thought it applied in part as to the rule of comparative negligence. I don't recall that you framed your complaint on the theory of diversity. You demanded a jury. I hardly believe that you are entitled to it, if it is a maritime tort, although there is some question about it.

It is stipulated that contributory negligence is one of the issues, so that I am applying the regular rule of New York in a diversity case, and I will try to follow exactly the last charge with the exception that I am going to charge the rule of contributory negligence.

Mr. Rosow: May I be heard on that?

The Court: No.

Mr. Garvey: Your Honor, I would like to renew my motions.

The Court: Yes. I will reserve decision on all
209 your motions.

Mr. Garvey: The motion to dismiss on the grounds advanced at the close of the plaintiff's case and of the affirmative testimony that now appears.

The Court: Yes, I will reserve decision on those motions.

Mr. Rosow: Will your Honor hear argument before you charge the jury on the ruling?

The Court: Yes.

Mr. Rosow: Do you wish to hear it now?

The Court: Yes, we might as well.

Mr. Rosow: Of course, on the charge or the failure to charge the jury on the doctrine of comparative negligence, while it is true that this is a case in which a jury was demanded, I do not believe, sir, that there is any preclusion from demanding a jury in a maritime tort. The foundation of the maritime tort is that the tort occurred on the navigable waters of the United States.

The Court: That is because the Court has jurisdiction in admiralty but you do not have juries in admiralty.

Mr. Rosow: To my knowledge, sir, the cases in which the law has been laid down on the maritime tort
210 aspect, some of them, sir, are admiralty cases.

The Court: I will agree that the Pope and Talbot case was a jury case and nobody said anything about it except Mr. Justice Frankfurter. I have personally had five or six cases that have come before me the last year where I asked the defendant whether they waive the plaintiff's right to a jury. The purpose of doing it that way was to present the issues clearly to the Court of Appeals, where we will have it over with once and for all.

I don't think you are entitled to a jury on a maritime tort. I may be wrong but if I am wrong you can show me.

Mr. Rosow: Well, regardless of whether or not we are entitled to a jury, the fact that the case is the jury calendar, I don't think that that is the governing measure as to whether or not the plaintiff is entitled to the rule of comparative negligence.

The Court: I don't think so either.

Mr. Rosow: I don't think that the rule of New York can be applied here and I think that it is quite clear—

The Court: You agree that it is either the rule of
211 New York or maritime law and there is no other third rule.

Mr. Rosow: That is correct. I do say that this is a maritime tort wherein the Federal Court has jurisdiction and where the venue is proper—

The Court: I think the venue is wrong. Actually I think it should be in Brooklyn, but nobody raised that question.

Mr. Rosow: Except that I believe the French ships or the corporate defendant is here in Manhattan.

The Court: All right, go ahead.

Mr. Rosow: The point that I wish to make to the Court is that the comparative negligence is more than a mere procedural standard in a maritime tort. In any maritime tort it is the essence of the right and the measure is so patently different that it can be construed as a deprivation of a fundamental right of any plaintiff trying a lawsuit under the Federal system and governed, if I may just refer to my brief, by one case—

Mr. Garvey: I believe this was argued in a maritime case before—

Mr. Rosow: Will you bear with me just one mo-
212 ment, your Honor?

(Short pause.)

The Court: Was it the very last one, somebody against some ferry company or something, on the next to the last page?

Mr. Rosow: It was in the Webster case, Webster v. Davis, which was a New York case—I am sorry, which was a Federal case wherein they held that comparative negligence would be applied and not the law of the forum.

The Court: I think it does apply in a maritime tort. The only difference between us is whether this was a maritime tort, and the way I am charging the jury is that it is not.

Mr. Rosow: I understand that, your Honor, and it is precisely that, the very definition of a maritime tort, is what happened in this case. This case happened aboard a vessel within the navigable waters of the United States. I do not think that the law of the forum on contributory negligence can possibly be applied.

The Court: You might be right but I will let the Circuit Court take that up.

212-A Mr. Rosow: May I respectfully except to your Honor's ruling?

The Court: Yes.

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Reporter's Certificate to foregoing transcript omitted in printing.

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234 (File Endorsement Omitted)

234 IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title Omitted)

Notice of Appeal—Filed December 14, 1955

SIRS:

PLEASE TAKE NOTICE that the plaintiff hereby appeals to the Court of Appeals for the Second Circuit from the judgment and order dismissing the complaint heretofore entered on the 18th day of November, 1955 and from each and every part thereof, and from all the adverse rulings of the Court prior thereto.

Dated: New York, N. Y.

December 8, 1955.

Yours, etc.

LOUIS M. VOLAN
Attorney for Plaintiff

/s/ WILLIAM L. STANDARD
Of Counsel to Attorney for Plaintiff
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To:

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WILLIAM V. CONNELL
Clerk of the United States District Court, Southern District of New York
Foley Square
New York, N. Y.

235 Affidavit of Service (Omitted in Printing)

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213 **Charge of the Court and Exceptions Thereto**

The Court: Ladies and gentlemen of the jury, you have been most courteous in your attention to this rather short case. I have always found, whether a case is short or long, that we gain something from it, and I think in this case at least some of us now know where the femur is and we now know too that we have a trochanter or a protuberance on the top of the femur; in fact, we each have two. I am afraid mine are too big. We also know that the French Line boat here, the Oregon, had a bar, and we know too that some Irishman sneaked over the fence and changed his name.

In any event, we are now at the most important part of the case, and that is the part that you ladies and gentlemen are going to play, because you are going to decide whether Joseph Kermarec is entitled to any money from the French Line, and if so, how much. And I know that you will approach that duty with all the open-mindedness that you can muster because it represents an American civic duty that has no parallel in our way of life.

You will recall that when you took your oaths as jurors you said that you will well and truly try this case.

213A And I suggest to you that when you get into the jury room you apply the same standards that you would want twelve other people to apply to a claim that you have or a case against you. In other words, do unto these people what you would want other people to do unto you.

What I propose to do is to review the facts very quickly and to tell you what the law is applicable to those facts, and to give you some rules to help you come to a determination.

As I recall the testimony, this plaintiff, a man now 67 years of age, sues for injuries he sustained back in 1948 aboard the defendant's S/S Oregon, when, after visting Mr. Henry, the male nurse on that ship, on a purely personal mission, he fell on one of the steps which was covered with canvas. There were evidently no eye witnesses, or at least none testified except the plaintiff, and he described the cause of his accident as the slipping of the canvas on one of the lower steps beneath his right foot, precipitating

his fall. There is testimony and there are photographs relating to the stairs and the canvas covering.

It would appear from the defendant's testimony that on the morning of the accident the canvas on the
213B stairs was there and that the canvas on each step was held in position by two tacks, the size of which you have been shown on the diagram.

There is evidently no dispute about the actual injury, or the hospital and medical expenses, or the loss of earnings, so I won't discuss that.

The parties have agreed too that the plaintiff was aboard the ship with the defendant's knowledge, consent and permission, so therefore there are three issues of fact that you must decide: (1) negligence, (2) proximate cause, and (3) damages.

With respect to the first issue of fact, namely, the alleged negligence of the defendant, you must bear in mind that the owner of a ship such as the defendant is subject to liability for bodily harm caused to a gratuitous licensee, such as the plaintiff, by any artificial condition on board the ship, only if both of the following conditions are present: (1) if the defendant knows of the unsafe condition and realizes that it involves an unreasonable risk to the plaintiff and has reason to believe that the plaintiff will not discover the condition or realize the risk; and (2) if the defendant invites or permits the plaintiff to enter or remain upon the ship without exercising reasonable
213C care either to make the condition reasonably safe or to warn the plaintiff of the condition and risk involved therein.

In short, in order that the plaintiff recover in this case, he must establish by a fair preponderance of the evidence that the defendant knew of the unsafe condition and invited the plaintiff aboard without either correcting the condition or warning him of it.

Unless the defendant or the defendant's employees—you must know that a corporation acts only through its employees and officers—unless the defendant or its employees, as I say, knew of the unsafe condition and also failed to correct it or warn the plaintiff about it after inviting him aboard, the plaintiff can recover.

In connection with this first issue, evidence has been

introduced by the defendant that the plaintiff went aboard the ship pursuant to a visitor's pass, which contained the following language:

"The person accepting this pass in consideration thereof assumes all risks for accidents and expressly agrees that the Compagnie Generale Transatlantique shall not be held liable under any circumstances, whether by negligence of their employees or otherwise, for any injury to his person or for any loss or injury to his property."

Unless you find that the terms of this language was brought home to the plaintiff and that those express terms applied to any particular alleged negligence of the defendant, then you may not find that the pass is binding on the plaintiff. Only if you find for the plaintiff and against the defendant on these issues which I have given you on the first issue of fact, need you consider the important question of proximate cause.

The plaintiff may not recover for any injuries or damages which were not the proximate cause of the defendant's negligence. If you find that the defendant was negligent, plaintiff must establish that such negligence was a substantial factor in producing the injury of which he complains.

It is entirely possible that a shipowner may be negligent on the one hand and the plaintiff actually injured on the other, without the necessary relationship of proximate cause between the two. Unless you find the negligence and the injury to the plaintiff and also that the negligence was a substantial factor in producing that injury, the plaintiff may not recover.

Only if you find the defendant was negligent and further find that such negligence was the proximate cause of plaintiff's injury need you consider the question of damages, that is, what amount of money will fairly compensate the plaintiff for the injuries that he has sustained.

In connection with damages, if you find that the plaintiff's injuries were the proximate result of the defendant's negligence and the plaintiff's own contributory negligence, even in the slightest degree, then the plaintiff cannot recover at all.

The mere fact that I discuss damages should not be

considered by you as an indication one way or the other that I believe the plaintiff is entitled to recover. If the plaintiff is not entitled to recover damages because the defendant is not liable, then he is no more entitled to the money of the defendant than he would be to your money or mine. If, however, the plaintiff has established that the defendant is liable, then damages should not be denied him.

The amount of damages is a sum of money that will fairly and justly compensate the plaintiff for his
216 pain and suffering, for the loss of wages, earning power, medical and hospital expenses.

You are the sole and exclusive judges of the facts. Upon you rests the responsibility of weighing the evidence and the credibility of the witnesses. In that connection I must instruct you that if any witness has testified falsely with regard to a material fact, you may disregard that part of the testimony which you believe to be false and accept the part that you do believe.

And in the summations the lawyers referred to facts and even I have. You are the sole and exclusive judges of the facts. If the lawyers misstated them or if I misstate them, disregard them. Base your recollection upon the facts as you remember them.

In considering the evidence in this case you must bear in mind that the plaintiff has the burden of proof on all of the issues that I have given you. Upon the plaintiff rests the responsibility of persuading you of his case, and that measure of proof is called the preponderance of the evidence. If the plaintiff has failed to sustain that burden, then you must find for the defendant. On the other-
217 hand, if the plaintiff has persuaded you by such preponderance, he is entitled to recover the amount of damages he has proved.

What I have said during the trial was to pass upon questions of law only in order to keep the issues in the case narrowed before you. If I have indicated any feeling one way or the other, please disregard it because I honestly have no feeling.

And now one final word to you jurors who might have served recently in the state courts: Here in the federal court verdicts must be unanimous.

When you get into your jury room you may ask for any or all of the exhibits you wish.

It is now ten minutes to one and I will arrange with the marshals to take you to lunch.

Are there any exceptions?

Mr. Rosow: Yes, your Honor, I have some exceptions.

The Court: Will you excuse us for a minute. We will go inside.

(The following took place in the robing room:)

Mr. Rosow: If your Honor please, may I respectfully except to so much of the charge, charging the jury
218 on the doctrine of contributory negligence, on the same grounds as stated on the record earlier in the trial.

May I also respectfully except to your Honor's charge on proximate cause on the ground that if they find that there was negligence, there is no issue as to the proximate cause in this case. The defendant has conceded that the injury was caused by the fall on the stairway.

The Court: I understood the concession to be that the doctor would testify that in his opinion one was the proximate cause of the other.

Mr. Garvey: That the fall would cause the injury that he testified to.

The Court: You do not concede or do you concede that one would be the proximate cause of the other?

Mr. Garvey: I concede that the fall caused the injury, that is all.

Mr. Rosow: In other words, my point is, your Honor, if the jury finds that there is negligence, then they must find automatically the proximate cause because there is no other cause alleged by the defendant to cause the injury.

219 Mr. Garvey: The Judge has in mind the proximate cause of the accident, not the proximate cause of the injury.

Mr. Rosow: That is the only exception I have.

Mr. Garvey: I don't remember the exact phraseology, Judge. You gave it in the alternative or paraphrased it when you said that if there is an unreasonable danger existing and the defendant believes that the plaintiff would not discover it, then the jury might find that the defendant was negligent; or, in other words, as you put it, I think if the

defendant knew of the dangerous condition and failed to warn the plaintiff. As to that I respectfully except.

And I don't think you defined negligence, as to what negligence is, Judge.

The Court: I think I did. I told them about the unreasonable risk—

Mr. Garvey: And reasonable care?

The Court: I think I used the words "reasonable care" too.

Mr. Garvey: I don't recall it. Other than the exception to the failure to charge pursuant to the requests, I have no other exceptions.

220 Mr. Rosow: I believe we have an automatic exception to those requests—

The Court: You have them anyway. I will put it this way. You have an exception to all the requests that I have not given or that I have denied.

Mr. Rosow: May I at this time make a request that the jury be charged that all of the witnesses except Dr. Huber are interested witnesses?

The Court: Too late.

Mr. Rosow: I thought that would be included in the charge.

(The following took place in the courtroom:)

(Marshals sworn.)

The Court: You may go with them now.

(The jury retires at 12:50 o'clock p.m.)

(At 2:50 o'clock p.m. the jury asked for and received all of the exhibits.)

(The following took place in the robing room at 3:35 o'clock p.m.:)

The Court: Gentlemen, I have a note from the jury which reads as follows:

"Assuming that the jury agrees that the canvas was laid in a negligent manner, is it then the duty of the jury to determine that this negligence was the cause of
221 the accident or is the fact of negligence sufficient to allow the jury to find for the plaintiff?"

Now, what I propose to do is to tell them that they then must find that negligence was the cause of the accident, and remind them that you stipulated that if the doctor had

been asked the hypothetical question he would have answered that the accident was the proximate cause of the injuries received.

Is that correct?

Mr. Garvey: Well, I concede that the accident was the cause of his injuries, but I did not concede anything about the proximate cause of the accident.

The Court: No, that is the point I make. I was going to tell them that you conceded, had the doctor answered the hypothetical question he would testify that the injuries received were the result of the fall.

Mr. Garvey: That is right.

The Court: But that it was for them to determine whether the negligence was the proximate cause of the injury.

Mr. Garvey: Yes.

Judge, I don't think that what you propose telling them is in answer to that question.

222 The Court: What do you think I should say?

Mr. Garvey: Well, I feel, as I see the law or as I understand the law, that even if the original act was negligent that that is not determinative as to negligence in relation to the plaintiff. There would have to be some affirmative act of negligence after plaintiff's arrival on board the vessel.

The Court: Am I not answering their question by saying yes, you must find that there exists proximate cause? Doesn't that answer the question categorically?

Mr. Rosow: I think it does, your Honor.

Mr. Garvey: Well, they would have to find the proximate cause, yes, but the finding of negligence originally in the laying of the canvas is not sufficient for the plaintiff to recover here, Judge.

The Court: They do not ask me that. They say "Assuming that the jury agrees that the canvas was laid in a negligent manner is it then the duty of the jury to determine that this negligence was the cause of the accident or is the fact of negligence sufficient to allow the jury to find for the plaintiff?"

Mr. Garvey: Well, that is not enough.

The Court: The answer is that negligence is not enough, there must be a proximate relationship?

223 Mr. Garvey: There must be a proximate relationship and there must be freedom from contributory negligence and an affirmative act of negligence after the arrival of the plaintiff aboard the vessel.

The Court: I understand your point.

All right, call the jury in.

Mr. Rosow: Is your Honor adopting Mr. Garvey's point?

The Court: No.

Mr. Rosow: I was prepared to argue it.

(The following took place in the courtroom, jury in box:)

The Court: I have received this note from the jury:

"Assuming that the jury agrees that the canvas was laid in a negligent manner, is it then the duty of the jury to determine that this negligence was the cause of the accident or is the fact of negligence sufficient to allow the jury to find for the plaintiff?"

The answer to that question is no, you cannot just go from negligence to an award to the plaintiff. You must find that there was a proximate relationship; in other words, you must find that the negligence was the proximate cause of the accident.

224 You will recall that Mr. Garvey stipulated when the doctor was on the stand and Mr. Rosow was asking the hypothetical question, he stipulated and said that the doctor would testify that the injuries received were caused by the fall.

That still does not mean that you have not the duty to find that the injuries resulted from the defendant's negligence. In other words, you must find as a fact under the charge that I gave you, one, that the defendant was negligent; two, that the negligence of the defendant was the proximate cause of the man's injury; and bear in mind that if the plaintiff was negligent in the slightest degree you cannot award a judgment in favor of the plaintiff.

Did you have a question, sir?

Juror No. 9: Is that word "proximate" or "approximate"?

The Court: No, proximate, p-r-o-x.

Juror No. 9: Thank you.

The Court: Are there any other questions?

(No response.)

The Court: If you have, then send out another note. You may now retire.

(The jury retired at 3:55 o'clock p.m.)

225 Mr. Garvey: Your Honor, may I take an exception to the charge as you gave it, on the refusal to give it as suggested in chambers?

The Court: Yes.

Mr. Garvey: After the receipt of the note.

Mr. Rosow: May I just renew my exception which I made earlier that Mr. Garvey having conceded the proximate cause, it is not an issue to be determined by the jury.

The Court: That depends on the record.

Did you concede proximate cause?

Mr. Garvey: I did not. I merely conceded that if the doctor was asked the hypothetical question whether the fall would produce the injuries which he described, he would answer in the affirmative. I conceded that the doctor would have testified in the affirmative whether the fall such as the plaintiff had would produce the injuries.

The Court: Well, your record is protected.

(At 5:00 o'clock p.m. the jury returned into the courtroom and the following took place:)

The Clerk: Ladies and gentlemen of the jury, this is just a roll call.

(Roll of jury called; all answered present.)

226 The Clerk: Ladies and gentlemen of the jury, have you agreed upon a verdict?

The Foreman: Yes, we have.

The Clerk: How do you find?

Verdict

The Foreman: We find that the plaintiff be awarded $7500.

The Clerk: Ladies and gentlemen of the jury, please listen to your verdict as it stands recorded: You say you find for the plaintiff in the sum of $7500 and so say you all?

(Jurors nodded in the affirmative.)

The Court: Do you want to poll the jury, Mr. Garvey?

Mr. Garvey: No.

The Court: Thank you very much, ladies and gentlemen. I am sorry that the time is five o'clock, but you put in a good day's work. Thank you.

(The jury left the courtroom.)

Mr. Garvey: If the Court please, I respectfully move to set aside the verdict as recorded on the ground that it is contrary to the law, contrary to the evidence, and on the exceptions noted during the course of the trial and the charge in connection therewith.

The Court: I am going to reserve decision on
227-228 that motion for a little while. If you want to submit a memorandum, I would appreciate it.

Mr. Garvey: I would be glad to do that, and I would like to renew the motion to dismiss at this time dependent upon your setting it aside. If you do set it aside. I would like to have my motion renewed as of this time.

The Court: I will reserve decision on that.

Do you have anything to say?

Mr. Rosow: No, Judge. I would just like time to file an answering brief.

The Court: Can you agree on some date?

Mr. Garvey: Judge, would two weeks be too long?

The Court: All right, the 18th, and if you reply by the 21st, will that give you sufficient time?

Mr. Rosow: Yes, Judge, I think so.

The Court: Very well. Good night.

Reporter's Certificate to foregoing transcript omitted in printing

EXHIBIT
U. S. Dist. Court
E. D. of N. Y.
OCT 3 1955
PLAINTIFF's Exhibit

5—

Defd. D dr: J.
5/17/55
J. Bickham

—Plaintiff

90

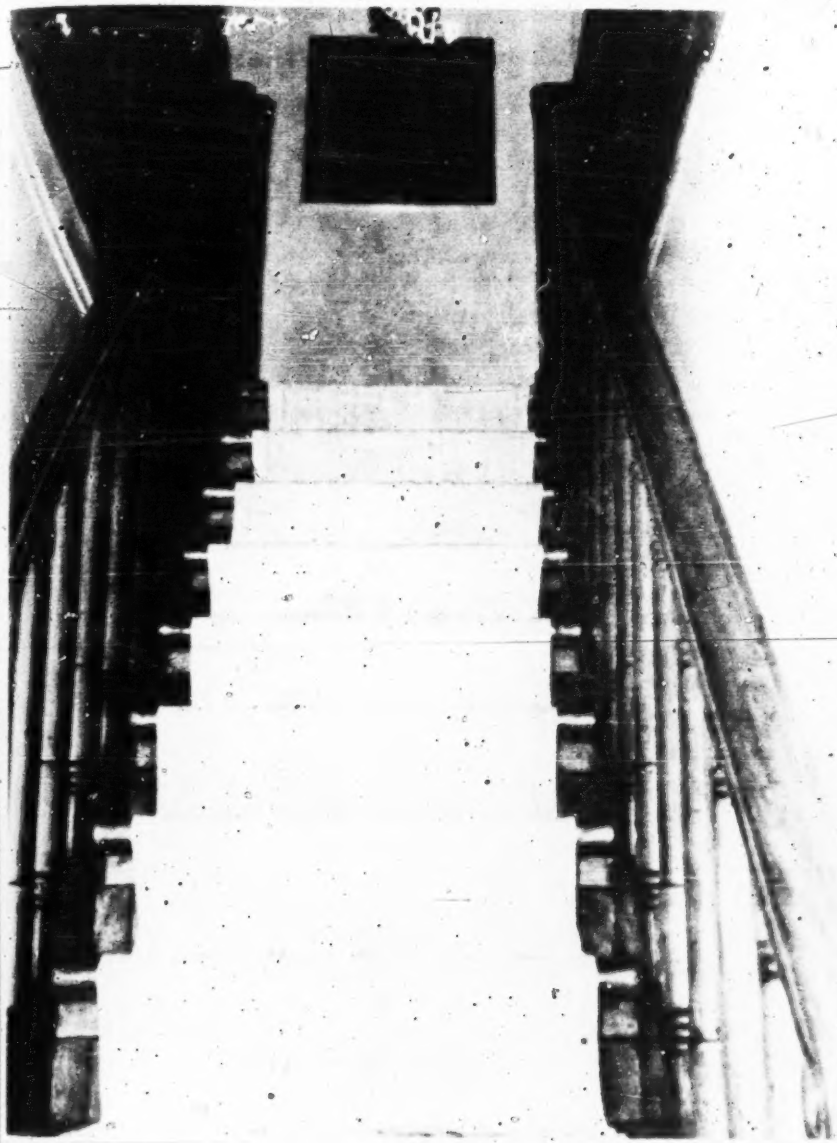
EXHIBIT
U. S. Dist. Court
S. D. of N. Y.
OCT 6 1949

DEFENDANT'S Exhibit C

EXHIBIT
U. S. Dist. Court
S. D. of N. Y.
OCT 6 1955

91

DEFENDANT'S Exhibit D



(FILE ENDORSEMENT OMITTED)

232 IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civ. 52-114

JOSEPH KERMAREC, *Plaintiff*,

—against—

COMPAGNIE GENERALE TRANSATLANTIQUE, *Defendant*

**Memorandum and Order Dismissing Complaint—
Dated November 18, 1955**

MURPHY, D. J.

Defendant moves to set aside the jury verdict of $7500 in plaintiff's favor and to dismiss the complaint.

Under the charge of the court, to which neither party excepted, the defendant was liable to the plaintiff, a bare licensee, only if it knew of the dangerous condition aboard ship and failed either to correct it or warn the plaintiff of it.

The question in essence is whether, reviewing the evidence as a whole in a light most favorable to plaintiff, there was any evidence that defendant knew the dangerous condition existed. Plaintiff offered no direct evidence of any such knowledge on the part of defendant. Indeed, plaintiff himself testified that the stairs and canvas looked perfectly normal. There was uncontradicted testimony by two of defendant's witnesses that the stairs so covered with canvas had been used earlier in the day by various crew members without any mishaps and the stairs were also used immediately after the accident without incident.

Plaintiff contends that the necessary knowledge must be imputed to defendant because its servants fastened the canvas with tacks that were so inadequate that defendant must surely have known that the canvas would become
233 loose and some one likely to fall. There was evidence as to the size of the tacks and as to the fact that they could be removed easily but no evidence that they were not suited for the purpose. Under the charge as it applied to these facts the question is not whether the defendant should have known of the dangerous condition (if in fact it was dangerous) but whether it actually did know of it.

Inasmuch as there has been a complete failure of proof on this issue the motion is granted and the complaint is dismissed.

This is an order. No settlement is necessary.

Dated, New York, N. Y., November 18, 1955.

THOMAS F. MURPHY
Thomas F. Murphy
U. S. D. J.

Judgment entered
WILLIAM V. CONNELL
11/18/55. Clerk

• • • • • • • • • • •

237 Clerk's Certificate to foregoing transcript omitted in printing

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238 IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 90—October Term, 1956.

(Argued January 7, 1957 Decided May 21, 1957.)

Docket No. 24203

JOSEPH KERMAREC, *Plaintiff-Appellant*,

v.

COMPAGNIE GENERALE TRANSATLANTIQUE,
Defendant-Appellee.

Before: CLARK, *Chief Judge*, LUMBARD and WATERMAN, *Circuit Judges.*

Appeal from an order of Thomas F. Murphy, *Judge*, Southern District of New York, setting aside a jury verdict for the plaintiff in the amount of $7,500. for injuries incurred through the alleged negligence of the defendant and unseaworthiness of the ship; and dismissing the complaint. Affirmed.

LOUIS M. VOLAN, New York, N. Y. (Malcolm B. Rosow and William L. Standard, of counsel on the brief), *for plaintiff-appellant.*

GEORGE A. GARVEY, New York, N. Y., *for defendant-appellee.*

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239 **Opinion—Decided May 21, 1957**

LUMBARD, *Circuit Judge:*

This action was brought to recover damages for personal injuries sustained by the plaintiff, Joseph Kermarec, a citizen of New York, aboard defendant's vessel, the S. S. Oregon, while berthed in the North River at New York.

Evidence was adduced at trial from which a jury could find that on November 28, 1948, about noon, Kermarec went aboard the S. S. Oregon with Henry Yves, a member of the crew. Yves had secured the issuance of a pass by the defendant to Kermarec.[1] Concededly the visit was a purely personal and social call and the two men went to Yves' room and partook of some refreshments. About four or five o'clock in the afternoon the two men decided to leave the ship. As they started down a stairway, Yves was called by another member of the crew. He turned back and Kermarec proceeded down the stairs by himself.

The stairway consisted of twelve steps, covered by a white canvas runner ⅛ inch thick. The canvas was clean and Kermarec testified that, as he started down, the stairs "looked alright all the way down." Holding the handrail, he continued his descent until he reached the fourth or fifth step from the bottom. The canvas then slipped from under his foot and he fell to the bottom of the stairway fracturing his right hip. While lying at the bottom of the stairway, Kermarec testified, he saw the canvas hanging loose off the edge of the step. Yves and Rene Dufy, the ship's bartender, came down the stairway immediately after Kermarec but they did not fall.

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[1] The pass contained the following disclaimer of liability: "The person accepting this pass, in consideration thereof, assumes all risks of accidents and expressly agrees that the Compagnie Generale Transatlantique shall not be held liable under any circumstances whether by negligence of their employees or otherwise, for any injury to his person, or for any loss or injury to his property."

240 The canvas had been fastened to a rubber tread on the stair by the ship's porter, Bourdon. Two small tacks, similar to carpet tacks, had been hammered through the canvas and into the rubber on each step; one on each side of the canvas. Bourdon further testified that the tacks were placed in the same position day after day and that they could be removed easily by "taking hold" of the canvas.

There was other and conflicting evidence but we have stated the facts in the light most favorable to the plaintiff to test the propriety of the dismissal by the district court. *Eckenrode* v. *Pennsylvania R. Co.*, 335 U. S. 329 (1948).

This action was brought on the civil side of the district court, the complaint alleging diversity of citizenship and that Kermarec's injuries resulted from the vessel's unseaworthiness and from the defendant's negligence. The trial court dismissed the issue of unseaworthiness and submitted only the negligence count to the jury, charging them that the plaintiff was a mere licensee and that the defendant would be liable "only if both of the following conditions are present:

> 1. If the defendant knows of the unsafe condition and realizes that is involves an unreasonable risk to the plaintiff and has reason to believe that the plaintiff will not discover the condition or realize the risk; and
>
> 2. If the defendant invites or permits the plaintiff to enter or remain upon the ship without exercising reasonable care either to make the condition reasonably safe or to warn the plaintiff of the condition and risk involved therein."

The jury returned a verdict for the plaintiff for $7,500. The defendant thereupon moved to set aside the verdict and dismiss the complaint. Judge Murphy granted
241 the motion on the ground that there was no evidence that the defendant had knowledge of the dangerous condition; or that such knowledge could be imputed to the defendant because its servants had used tacks inadequate for the purpose. It is from this order that the plaintiff appeals and also from dismissal of the unseaworthiness count. We agree with both rulings of the district court.

The plaintiff does not stand in such a relationship to the ship that he could maintain an action on the theory of unseaworthiness; *Pope & Talbot* v. *Hawn*, 346 U. S. 406 (1953); nor did he show facts entitling him to a recovery on the theory of negligence. *Gunnarson* v. *Robert Jacob, Inc.*, 94 F. 2d 170 (2 Cir. 1938), cert. den. 303 U. S. 660 (1938); rehearing den. 304 U. S. 388.

It seems abundantly clear that Kermarec was a mere licensee. He came upon the ship for his own pleasure and convenience and while the defendant consented to his coming, it did not invite him aboard for any "business" purpose.

Although the concept of analogizing the guest of a seaman on ship to the guest of a tenant on a leasehold, advanced in the dissenting opinion, would be an interesting argument if this were a novel question, it has long been held that the guest of a seaman is nothing more than a licensee. Thus in *Metcalfe* v. *Cunard S. S. Co.*, 147 Mass. 66 (1888) the plaintiff, going aboard defendant's ship to consult with the ship's doctor, was held to be a licensee; and in *Freeman* v. *United Fruit Co.*, 223 Mass. 300 (1916) a tailor, admitted aboard ship to fit a seaman's uniform, was held to be a licensee; in *Kasba* v. *Bank Line*, 46 F. 2d 119 (D. C. Md. 1931) plaintiff came aboard ship to install a piano, the personal property of the captain, in order to provide entertainment for the ship's officers, and was denied recovery since he was a mere licensee; in *Silverado S. S. Co.* v. *Prendergast*, 31 F. 2d 225 (9 Cir. 1929), 242 the plaintiff was invited aboard the defendant's cargo ship as the social guest of the master, and was held to be a licensee. See also *Apostolon* v. *Eugenia Chandris*, 38 A. M. C. 995 (D. C. Ore. 1938) social guest of a steward, held licensee. As to an employee's visitor on business premises, cf. *Ridley* v. *National Casket Co.*, 161 N. Y. S. 444 (1916) aff'd 178 App. Div. 954 (4 Dept. 1917), the cases cited in *Meirs* v. *Koch Brewery*, 229 N. Y. 10 (1920), and 87 A. L. R. 757.

Shipowners are not landlords to their seamen; it is not their business to furnish for their seamen living quarters or any visiting rooms where they may entertain guests at any time. Quite the contrary, there are many reasons why in order properly to control what happens on board,

shipowners customarily forbid access to visitors except to certain parts of the ship at certain hours. For this purpose the shipowner issues passes as was done here. To analogize the shipowner to a landlord would disregard many pertinent and obvious facts of the seaman's status as one who while on board lives where he works.

The seaman has no right to have anyone visit him whenever he chooses; he may not even stay aboard himself except as he is a member of the crew and then only so long as his employment may continue. While the shipowner may permit friends to visit the seaman's ship at certain times when he is not at work, as here upon the issuance of a pass, both visitor and seaman know full well that this is a privilege revocable at the shipowner's pleasure. Indeed the regular routine of maintaining a ship, such as this, even while in port, requires the division of seamen and much of the ship's personnel into three watches, and at all times of the day or night some members of the crew are sleeping. Hence there are many reasons why free access is not granted to visitors. Thus the shipowner's relationship to his seamen is very different from that of a landlord to his tenant.

243

The high duty of care which the maritime law has required of shipowners with respect to seamen arises from necessities of the calling which provoke a solicitude for the seaman's welfare. But the seaman's visitor who attends at his own choice, for a purpose which is of no benefit to the ship, is on sufferance.

A cause of action for unseaworthiness, while available to seamen and stevedores, is not available to Kermarec who was nothing more than a licensee. *The Osceola,* 189 U. S. 158 (1903); *Seas Shipping* v. *Sieracki,* 326 U. S. 700 (1945); *Pope & Talbot* v. *Hawn, supra.* Kermarec did not make any contribution to the ship's safety, preservation or progress; he did not submit his life and safety to the ship as a seaman does; he did not load her for voyage as a stevedore does; consequently he does not have any right to recover for unseaworthiness.

Nor does *Pope & Talbot* v. *Hawn, supra,* pressed on us by appellant, require a different result. In *Pope & Talbot,* the plaintiff, Hawn, was employed by an independent contractor to make repairs on the petitioner's vessel which

was docked in the Delaware River within the territorial waters of Pennsylvania. He slipped and fell through an uncovered hatch hole on the vessel and sustained injuries for which he sought recovery. Hawn's suit was brought on the law side of the district court and his complaint alleged that his injuries were the result of unseaworthiness and negligence on the part of Pope & Talbot. Notwithstanding a finding of contributory negligence, a recovery was allowed on the basis of the admiralty rule of comparative negligence. In affirming that decision, the Supreme Court rejected the connection that the Pennsylvania rule of contributory negligence should apply, holding that Hawn's action was governed by the federal maritime law. The
244 court stressed the fact that Hawn was injured in navigable waters "while working on a ship to enable it to complete its loading for safer transportation of its cargo * * *" 346 U. S. 406, 409.

Though the concept of who is a seaman has been broadened in recent court decisions, we cannot say that this guest of a member of the crew, who came aboard for a social visit, even with the owner's acquiescence, should be classed as a seaman and entitled to sue for unseaworthiness.

Nor has Kermarec shown the requisite breach of duty on the part of the defendant to entitle him to recover on the theory of negligence. *Gunnarson* v. *Robert Jacob, Inc., supra.* In *Gunnarson,* a proceeding to limit a shipowner's liability, a claim was filed by the son of the ship's captain to recover for injuries incurred through the alleged negligence of the shipowner. The claimant went aboard the vessel to visit with his father and, though he helped him work a tank of gas into a storage space, the main purpose of the visit was purely social. It was found that the ship's captain had been negligent in installing the gas tank and that this negligence caused it to explode, thus injuring the claimant. Gunnarson, the claimant, was found to have been a mere licensee because of the social nature of his visit, and the claim was dismissed.

The general rule is that the shipowner shall not wilfully or wantonly injure a licensee, or expose him to hidden perils or fail to use due care to prevent injury to him after discovering that he is in danger. *Kasba* v. *Bank Line, supra; Silverado S. S. Co.* v. *Prendergast, supra; Lanchert*

v. *American S. S. Co.*, 65 F. Supp. 703 (W. D. N. Y. 1946); *The Sudbury*, 14 F. 2d 533 (D. C. Ore. 1926). *Rodermond* v. *United States*, 199 F. 2d 955 (3 Cir. 1950).

In the instant case Kermarec argued that the defendant had breached its duty in failing to notify him that a dangerous condition existed on the stairs. There was no
245 evidence to show that the defendant knew that the stairs were in a dangerous condition. On the contrary, there was testimony of crew members that the stairs had been used without mishap throughout the day both before and after the accident and that they had noticed nothing unusual.

The plaintiff, however, maintains that the necessary knowledge could be imputed to the defendant because the tacks used by its servants were clearly inadequate for that purpose. There was no evidence that the tacks were inadequate. The plaintiff's argument derives solely from a scale drawing of a tack which drawing was in evidence. Standing alone, and in the light of all the surrounding circumstances, this was not enough to permit the jury to draw the inference that the defendant should have known that the condition of the stairway presented a condition of danger to Kermarec of which he should have been warned.

Our decision does not require us to pass on the validity of the disclaimer of liability clause contained in the pass issued by the defendant, and we refrain from so doing.

The judgment is affirmed.

CLARK, *Chief Judge* (dissenting):

However the defendant's duty is defined here, liability would seem clear or at least so apparent as to justify the moderate award the jury gave. Putting a loose canvas on a steep flight of stairs is an invitation to injury; that the practice had been followed for some time without casualty can be only sheer luck. Two small tacks, removable by hand alone, were placed at the front of each tread on either side. That was all; nothing held the material going back to the rear of the tread or up the riser to the tread above. Each day the ship was in port the ship's porter, Bourdon, in the scope of his employment removed the

246 canvas by just picking it up, "and the tacks come out by themselves"; then after washing the steps, he retacked the canvas in the same position. The opportunities for loose or bulging canvas to trip users of the stairs are so obvious to anyone who has ever mounted a stairway that not surprisingly the jury found Bourdon had actual knowledge of the danger, but was too lazy to remedy it by securing the material properly.

Neither under the erroneous charge which the trial court gave the jury nor under the more favorable instructions to which the plaintiff was entitled was it necessary to show that the defendant company (*i.e.*, its top officers) had actual knowledge of the danger: (1) If liability rests on Bourdon's affirmative negligence in improperly tacking the carpet, his employer is vicariously liable without fault of its own on principles of *respondeat superior*; (2) if the fault is in the company's failure to repair or warn of a hidden dangerous condition, actual knowledge of the employee who created it may be imputed to the employer because the knowledge concerns a matter as to which the employee acts within the scope of his employment, *e.g.*, 1 Restatement, Agency §272, comment *a*2 (1933); *In re Texas City Disaster Litigation*, 5 Cir., 197 F. 2d 771, affirmed 346 U. S. 15; *Cashin* v. *Northern Pac. Ry. Co.*, 96 Mont. 92, 108, 28 P. 2d 862, 868; (3) if, contrary to the charge, the plaintiff was an invitee the company owed him a duty to inspect for hidden dangers, and actual knowledge of the danger need not be shown; and (4) if, contrary to the charge, the plaintiff was entitled to a seaworthy staircase the shipowner was liable without fault, though it lacked knowledge of the unseaworthy condition, *Alaska S. S. Co.* v. *Petterson*, 347 U. S. 396.

In view of these facts it may seem academic to spend much time discussing the particular legal theory on which recovery should be based. But for future cases the
247 point may be important or decisive, and I therefore turn to it. After discussing the applicable law, I shall try to establish that (1) the plaintiff was an invitee; (2) even as a licensee the plaintiff can recover on these facts; (3) the owner's duty to keep the vesesl seaworthy extends to social guests of resident seamen visiting them aboard ship.

1. *Federal maritime law applies.* *Pope & Talbot, Inc.* v. *Hawn,* 346 U. S. 406, 409, holds that a federal court whose jurisdiction stems from the diverse citizenship of the parties must apply federal maritime law where (a) the tort occurred in navigable waters; (b) the complaint sounds in negligence and unseaworthiness—rights of recovery "rooted in federal maritime law"; and (c) the tort is "maritime" in the sense of *Atlantic Transport Co. of West Virginia* v. *Imbrovek,* 234 U. S. 52, 61-63, 51 L. R. A. N. S. 1157. The *Imbrovek* case involved the jurisdiction of admiralty courts over torts in navigable waters which are part of a state, from which it follows that those torts are "maritime" in the meaning of *Pope & Talbot, Inc.* v. *Hawn, supra,* 346 U. S. 406, which can be remedied in a federal court of admiralty. In the *Imbrovek* case, *supra,* 234 U. S. 52, 61-63, the Supreme Court declined to decide whether location in navigable waters was alone sufficient to make a tort "maritime" or whether further nautical flavor was required. But under either test this plaintiff's claim qualified: It occurred aboard an ocean-going vessel; plaintiff's reason for being aboard was to visit a resident seaman; the accident was partially due to the steep stairway peculiar to ships. I conclude that the district court erred in applying state rather than the general maritime law to the case.[1]

248 2. *The plaintiff was an invitee.* Any discussion of the categories of invitee, licensee, and trespasser would be quite inadequate without the observation that these distinctions have been more and more obscured during the last century as courts have moved toward imposing on owners and occupiers a single duty of reasonable care in all the circumstances. See the authorities collected in 2 Harper & James, The Law of Torts §27.1 (1956). The concept of *invitee* has been broadening as courts have oscillated between viewing "invitation" or "economic benefit" as the essence of the category. See 2 Harper & James, The Law of Torts § 27.12 (1956). Under either approach the guest of a resident seaman should qualify as an invitee in the eyes of contemporary federal maritime law.[2]

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[1] Even under New York law I think liability follows under the cases I cite at the end of this opinion.

[2] *Freeman* v. *United Fruit Co.,* 223 Mass. 300, 111 N. E. 789, applying the nonmaritime Massachusetts law of 30 years ago, held to the contrary.

If invitation is the touchstone, it must be shown that persons authorized by the defendant led the plaintiff to believe that the owner intended the premises to be used by visitors for this purpose and adapted the premises for that use. 2 Harper & James, The Law of Torts §27.12 (1956). This requirement was met by evidence that plaintiff knew his presence aboard was authorized by an official visitor's pass obtained by his seaman host; that plaintiff was not shown the limitations written on that pass; and that plaintiff saw the canvas placed on the stairways to keep them neat and clean for visitors while the ship was in port.

These facts distinguish the cases cited by my brothers where the finders of fact decided that the invitation was extended by a crew member without the shipowner's authority and no conduct of the shipowner suggested apparent authority of the crew member to extend such consent, *e.g.*, *Metcalfe* v. *Cunard S. S. Co.*, 147 Mass. 66, 16
N. E. 701 (plaintiff slipped through an unattended
249 gate not officially open to visitors on that day and went up the freight gangplank under the erroneous impression that his friend was aboard the vessel); *Kosba* v. *Bank Line*, D.C. Md., 46 F. 2d 119 (the pass informed the plaintiff that he was permitted aboard for the private business of the captain, and not in the interest of the ship); *Silverado S. S. Co.* v. *Prendergast*, 9 Cir., 31 F. 2d 225, certiorari denied *Prendergast* v. *Silverado S. S. Co.*, 280 U. S. 557 (the ship's master, without authority, took a drunken friend aboard in the middle of the night); *Apostolou* v. *S. S. Eugenia Chandris*, D. C. Ore., 38 A. M. C. 995, appeal dismissed 9 Cir., 103 F. 2d 1006 (plaintiff was invited aboard by a steward who had no authority, actual or apparent, to issue the invitation); *Gunnarson* v. *Robert Jacob, Inc.*, 2 Cir., 94 F. 2d 170, certiorari denied *Robert Jacob, Inc.* v. *Gunnarson*, 303 U. S. 660 (the master invited his son aboard without the real or apparent authority of the shipowner).

That the present plaintiff had an implied invitation is supported by cases labeling as "invitees" persons who came aboard without conferring the slightest economic benefit upon the shipowner and without express invitation, *e.g.*, *Radoslovich* v. *Navigazione Libera Triestina, S.A.*, 2 Cir., 72 F. 2d 367 (a bargee crossing the shipowner's vessel to get to the pier to enjoy his leisure is an invitee); *Griffiths*

v. *Seaboard Midland Petroleum Co.*, D. C. Md., 33 A. M. C. 911 (plaintiff, crossing the shipowner's vessel to get to the pier, is an invitee). *Cf. The Francesca*, D. C. W. D. N. Y., 37 A. M. C. 1006 (a high duty of care is owed to a gratuitous passenger); *The Cayuga*, 9 Cir., 37 A. M. C. 203 (same); *McLoughlin* v. *Mulqueen*, D. C. E. D. N. Y., 29 A. M. C. 1626 (an infant child of a crew member's social guest may be an invitee).

Frequently admiralty courts have used the economic benefit approach, substituting the label "business visitor" for "invitee". Plaintiff qualified as a "business
250 visitor," since the shipowner benefits by having his employees enjoy necessary recreation, as recognized in the cases allowing seamen to recover maintenance and cure for injuries suffered in the course of shore-side recreation, *e.g.*, *Warren* v. *United States*, 340 U. S. 523 (the seaman fell out of the window of a room adjoining a dance hall after drinking wine); *Aguilar* v. *Standard Oil Co. of N. J.*, 318 U. S. 724 (the seaman was injured while ashore on personal business); *Farrell* v. *United States*, 336 U. S. 511 (the seaman fell in a dry dock while returning to his ship after overstaying his leave); *Nowery* v. *Smith*, D. C. E. D. Pa., 69 F. Supp. 755, affirmed 3 Cir., 161 F. 2d 732 (the seaman was injured in a barroom fist fight).

In view of the shipowner's liability to the seaman for injuries suffered in shore-side recreation, it is in the owner's economic interest to encourage recreation aboard ship, rather than ashore, thus making the seaman's activities subject to control and the men available on ship whenever needed. That benefit to the shipowner may be thus indirect should be no more fatal to plaintiff's preferred status here than in the cases where we have labeled a person on board a transatlantic liner to see a passenger off a "business visitor" of the shipowner. *McCann* v. *Anchor Line*, 2 Cir., 79 F. 2d 338; *accord*, *The Champlain*, N. Y. Sup., 34 A. M. C. 25.

Pertinent, too, is the role which the landlord and tenant relationship plays in mitigating the concept of "licensee" in cases ashore. Persons who are not "invitees" vis-a-vis the owner of a building are owed the same high duty of care when injured in the common hallways or approaches over which the owner retains control because they are so-

cial guests of the owner's tenants, *e.g.*, *Pessagno* v. *Euclid Inv. Co.*, D. C. Cir., 112 F. 2d 577; *Klotz* v. *Ganz*, 296 N.Y. 715, 70 N. E. 2d 538; *Bowers* v. *City Bank Farmers Trust Co.*, 282 N. Y. 442, 26 N. E. 2d 970. True, courts
251 sometimes fail to make clear whether such persons are regarded as invitees or persons in the shoes of the tenant, since in either event they are owed the duty of reasonable care to make the area reasonably safe, *e.g.*, 2 Restatement, Torts §§ 360, 332, comment *h* (1934); 2 Harper & James, The Law of Torts § 27.17 (1956); *Boyce* v. *228th and Carpenter Ave. Holding Co.*, 295 N. Y. 575, 64 N. E. 2d 282. But the result is the same.

Placing this higher duty on the owner to these persons is quite fair because the individuals injured expect the passageways to be made safe for them; the owner anticipates their presence there; and the owner is the only person in a position to discover the danger and avoid the accident by reasonable precautions. Aboard vessels, of course, the resident seaman is not technically a tenant; but his social guest is entitled to the higher duty of care owed a tenant's guest for the reasons stated. Perhaps the closest shore-side analogy to plaintiff is a resident janitor's social guest, held to be an invitee. *Mercier* v. *Bushwick Sav. Bank*, 261 App. Div. 151, 24 N. Y. S. 2d 666, affirmed 261 App. Div. 1105, 27 N. Y. S. 2d 1003. How strange it is after *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; *Alaska S. S. Co.* v. *Petterson*, *supra*, 347 U. S. 396; and *Pope & Talbot, Inc.* v. *Hawn*, *supra*, 346 U. S. 406, that a federal court is unwilling to read federal maritime law as imposing a duty on the shipowner as broad as a landowner's duty ashore!

My brothers balk at such a conclusion, pointing to the restrictions which a shipowner places on the visiting hours of seamen's guests; but similar limitations surround a transatlantic passenger's visitor, who is an invitee, *e.g.*, *The Champlain*, *supra*, N. Y. Sup., 34 A. M. C. 25 (the court ignored the restrictions written into the visitors's pass); *McCann* v. *Anchor Line*, *supra*, 2 Cir., 79 F. 2d 338. Of course the shipowner may restrict the hours of the invi-
252 tation, but there is no showing here that such limitations were violated or that they were brought to the attention of the plaintiff.

3. *The defendant breached the duty owed a licensee.* But the plaintiff's recovery can be justified even if he is saddled

with the dolorous sobriquet of "licensee." As indicated previously, Bourdon could be found to have had actual knowledge of the danger; and this knowledge may be imputed to the defendant employer. Whether the negligence be viewed as an "activity" (Bourdon's daily retacking of the canvas) or a "condition of the premises" (the dangerous stairway), the defendant owed the plaintiff a higher duty of care than the majority opinion suggests.

a. The defendant's negligent activity. "There are a good many dicta—mostly in older cases—and some holdings to the effect that the occupier of land owes the bare licensee no greater duty than to refrain from intentional, or willful or wanton, misconduct towards him. 'The prevailing view is to the contrary, however, and it is now generally held that in cases involving injury resulting from *active conduct*, as distinguished from conditions of the premises, the landowner or possessor may be liable for failure to exercise ordinary care towards a licensee whose presence on the land is known or should reasonably be known to the owner or possessor.' • • • At any rate, there is well-nigh universal agreement that the duty of care is owed to licensees whose presence is to be expected." 2 Harper & James, The Law of Torts § 27.10 (1956), quoting *Oettinger* v. *Stewart*, 24 Cal. 2d 133, 138, 148 P. 2d 19, 22, and collecting state law authorities. In admiralty the law is the same, *e.g.*, *Yuri Maru-Juan*, D. C. E. D. Pa., 27 A. M. C. 571; *The Cayuga*, *supra*, 9 Cir., 37 A. M. C. 203; *The Francesca*, *supra*, D. C. W. D. N. Y., 37 A. M. C. 1006; *The Champlain*, *supra*, N. Y. Sup., 34 A. M. C. 25 (dictum).

253 *b. The condition of the premises.* An owner need not inspect his premises to discover dangerous conditions that might imperil licensees, but if "he learns of such a condition and should realize that it is unreasonably dangerous to a licensee, and if the occupier 'cannot reasonably assume that the licensee knows [of the condition], or by a reasonable use of his faculties would observe' it, then the occupier is under the duty to use due care to avoid the injury, either by removing the danger or by giving reasonable warning of its presence." 2 Harper & James, The Law of Torts § 27.9 (1956). Here, too, admiralty law is in accord, *e.g.*, *The Blue Moon III*, D. C. W. D. N. Y., 60 F. 2d 653 (the

owner of a vessel is liable to a social guest because the owner's employee failed to warn the guest of a slippery deck created by the employee).

4. *Recovery for unseaworthiness.* The shipowner's duty to keep the vessel seaworthy extends to persons other than seamen and stevedores. In *Pope & Talbot, Inc.* v. *Hawn, supra,* 346 U. S. 406, 412, 413, the Supreme Court was asked to limit its historic decision in *Seas Shipping Co.* v. *Sieracki, supra,* 328 U. S. 85, to "stevedores," but it refused with these words: "These slight differences in fact cannot fairly justify the distinction urged as between the two cases. Sieracki's legal protection was not based on the name 'stevedore' but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness. The ship on which Hawn was hurt was being loaded when the grain loading equipment developed a slight defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt. His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on a voyage.
254 All were subjected to the same danger. All were entitled to like treatment under law."

While it is true that the Supreme Court referred to the type of work done by Hawn as one reason for allowing him to recover for unseaworthiness, I do not believe performance of "ship's work" is a *sine qua non* to recovery on that theory. The *Sieracki* case, which *Pope & Talbot, Inc.* followed, gave as the reason for extending the unseaworthiness doctrine to certain nonseamen the similarity of such individuals to seamen as regards exposure to the same dangerous appliances, inability to bear the expense of injury, inability to discover or remove the dangerous condition, inability to recover for the loss from their employer, and inability to distribute the loss to the shipping industry as well as the shipowner. *Sea Shipping Co.* v. *Sieracki, supra,* 328 U. S. 85, 95-96. Plaintiff meets these criteria.

My colleagues do not decide the validity of the disclaimer of liability in the pass, which was not shown to the plaintiff in any event. I fined it has no legal effect. *Moore* v. *American Scantic Line,* 2 Cir., 121 F. 2d 767.

Apart from its effect on the present litigants, I find our present decision most unfortunate, because it seems another instance of judicial meddling with jury verdicts with which the judges disagree. Further, this seems to me another instance, such as *Avlon* v. *Greencha Holding Corp.*, 2 Cir., 239 F. 2d 616, where originally the deductions made in attempted subservience to state law resulted in a federal inflexibility, and resulting inhumanity, which in my opinion would not be found in the state law itself. See *Curren* v. *O'Connor*, 304 N. Y. 515, 109 N. E. 2d 605; *Vorce* v. *Murray*, 143 App. Div. 962, 128 N. Y. S. 528; *Friedman* v. *Berkowitz*, 206 Misc. 889, 136 N. Y. S. 2d 81; *Higgins* v. *Mason*, 255 N. Y., 104, 174 N. E. 77 (dictum)—holding
owners liable to licensees for active negligence.
255 Compare Annotation, Liability to bare licensee as affected by distinction between active and passive negligence, 156 A. L. R. 1226. But whatever be the inconsistencies discovered or apprehended in local New York law, the admiralty law, I submit, should be, and is, clear cut. I would restore the jury verdict.

256A (File Endorsement Omitted)

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256 IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

• • • • •

Present: Hon. Charles E. Clark,
Chief Judge
Hon. J. Edward Lumbard,
Hon. Sterry R. Waterman,
Circuit Judges

Joseph Kermarec, *Plaintiff-Appellant*

v.

Compagnie Generale Transatlantique, *Defendant-Appellee*

Judgment—May 21, 1957

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

257A (File Endorsement Omitted)

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257 IN UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

• • • • •

Present: HON. CHARLES E. CLARK,
Chief Judge
HON. J. EDWARD LUMBARD,
HON. STERRY R. WATERMAN,
Circuit Judges

(Title Omitted)

Order Denying Petition for Rehearing—June 24, 1957

A petition for a rehearing having been filed herein by counsel for the appellant

Upon consideration thereof, it is
Ordered that said petition be and hereby is denied

A. DANIEL FUSARO
Clerk

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258 (Clerk's Certificate to foregoing transcript omitted in printing)

No. 221 Misc., October Term, 1957

JOSEPH KERMAREC, *Petitioner*,

v.

COMPAGNIE GENERALE TRANSATLANTIQUE

ON PETITION FOR WRIT OF CERTIORARI TO the United States Court of Appeals for the Second Circuit.

Order Granting Motion for Leave to Proceed in Forma Pauperis and Granting Petition for Writ of Certiorari—December 18, 1957

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 669.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

December 16, 1957

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 22

JOSEPH KERMAREC,

Petitioner,

against

COMPAGNIE GENERALE TRANSATLANTIQUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

STANDARD, WEISBERG, HAROLDS & MALAMENT
LOUIS M. VOLAN
Attorneys for Petitioner

EDWARD J. MALAMENT
MALCOLM B. ROSOW
Of Counsel

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 22

JOSEPH KERMAREC,

Petitioner,

against

COMPAGNIE GENERALE TRANSATLANTIQUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Court (S.D.N.Y., Murphy, *D.J.*, R. 93-94) does not appear in the Official Reporter. The opinions of the Court of Appeals (R. 94-108) are reported in 245 F. (2d) 175. Petition for rehearing was denied by the Court of Appeals without written opinion (R. 109).

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered May 21, 1957 (R. 108-109). The petition for a Writ of Certiorari was filed on September 23, 1957 and granted on December 16, 1957 (R. 110).

The jurisdiction of this Court to review the final judgment of the United States Court of Appeals for the Second Circuit is provided by Sections 1254(1) and 2101(c) of Title 28, U.S. Code.

Statement of the Case

On November 24, 1948, about noon, Kermarec accompanied by Henry Yves, a member of the crew, boarded the S.S. Oregon while berthed in the North River at New York City (R. 46-48). In accordance with customary practice permitting crew members to entertain guests aboard the vessel, Yves had obtained a pass from the executive officer of the vessel specifically authorizing Kermarec's visit (R. 20, 46). Yves retained the pass and it was neither shown, read nor explained to Kermarec (R. 48). The visit, concededly, was personal and social (R. 8).

Petitioner remained on the vessel until 4:00 or 5:00 p.m. While leaving the vessel under the guidance of Yves, petitioner began to descend a 12-14 step crew and passenger stairway covered with a continuous white canvas runner about 1/8" thick (R. 11, 12, 15, 57, 69, 73, 90, 91). The stairs appeared "normal" and "looked alright all the way down" (R. 12, 24). Holding on to the handrail, Kermarec continued his descent without any mishap until he reached the fourth step from the bottom. At this point the canvas, suddenly slipped from under his foot and he was precipitated to the bottom of the stairway striking his right hip (R. 12). While lying at the bottom of the stairway, petitioner saw the canvas hanging off the ledge of the step (R. 13, 26).

The canvas had been fastened to the step by Bourdon, a ship's porter, as part of his regular duty to clean and cover the stairway upon arrival in port (R. 53, 55, 56, 57). The only instruction received from the Chief Steward, his

superior officer, was that "the canvas cover must be tight, that you don't have any trouble with it" (R. 66). The vessel had arrived in port the day preceding the accident (R. 55). After the passengers had left, Bourdon cleaned the stairs and laid the canvas runner (R. 55, 56). On the following day, the day of the accident, at 8:00 a.m., less than 24 hours after he had first cleaned the stairs, he had to pick up the canvas a second time, clean the steps and reset the canvas because they were "not quite clean, somewhat dirty, from the crew of the ship" (R. 56). The picking up and laying down of the canvas runner was "routine" and involved "always the same kind of work" (R. 56). The canvas was fastened by means of two small carpet tacks, one on each side of the canvas to the front edge of the steps (R. 58).[1] Nothing held the canvas to the rear of the step or up the riser to the step above (R. 60). The lifting and removal of the canvas runner could be done quickly. The tacks were pulled out by hand alone. As Bourdon put it, "It is not hard at all, you just get hold of the canvas and then the tacks come out by themselves" (R. 32, 60).

As a result of his fall, petitioner sustained a fracture of the right femur with displacement and shortening. He was hospitalized from November 24, 1948 until February 12, 1949, and was disabled from work until October 16, 1949. There was no dispute during the trial as to the injury, loss of wages, hospital or medical expenses (R. 79).

The case was tried twice, before the same Judge and two different juries. The first jury disagreed and the Court denied respondent's motion to dismiss the complaint after discharging the jury. At the end of the second trial, the jury rendered a verdict for the petitioner in the sum of

[1] The size of the tack is indicated by Bourdon's own drawing (R. 89, Plaintiff's Exhibit 5). The typical location of the two tacks in each step is shown by Bourdon's two crosses on the top step of the stairway photograph (R. 90, Defendant's Exhibit C).

$7500. The Court thereupon granted respondent's motions to set aside the verdict and dismiss the complaint (R. 2).

The trial judge charged the jury that petitioner was a "gratuitous" and "bare" licensee and that the law of the forum, i.e., New York, applied; pursuant to which plaintiff could recover only if the jury found that the respondent knew of the unsafe condition created by the canvas and failed to correct it or warn the petitioner about it (R. 74, 79, 93). He refused to charge that petitioner's accident was a maritime tort, and accordingly, refused to apply the federal maritime doctrines of comparative negligence and unseaworthiness (R. 74, 77, Transcript of Proceedings Below, pp. 99, 220). In his opinion setting aside the verdict and dismissing the complaint, Judge Murphy conceded that "there was evidence as to the size of the tacks and * * * that they could be removed easily." He nevertheless found that there was a "complete failure of proof" that the respondent "had actual knowledge of the dangerous condition" or that such knowledge could be imputed to the respondent because its servants had used tacks inadequate for the purpose" (R. 93, 94, 96).[2]

Circuit Judge Lumbard speaking for the majority of the Court conceded that "evidence was adduced at trial from which a jury could find" that the canvas was fastened to each step by two tacks only; that these could be removed simply by taking hold of the canvas, and that Kermarec had sustained his injury when the canvas had slipped under his foot. The Court of Appeals, nevertheless, affirmed the dismissal below and sustained the trial Court on its interpretation of the applicable law (R. 95-100).

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[2] Since the jury verdict was in plaintiff's favor, the Court's refusal to apply the principle of comparative negligence was not prejudicial. However, the failure to apply the doctrine of unseaworthiness was prejudicial, since it would have obviated the proof of knowledge which, according to the Court, petitioner had failed to prove.

The sharp dissent of Chief Judge Clark sets forth substantially the basis for this appeal (R. 100-108).

Questions Presented

1. Whether a shipboard injury, in navigable waters, to an authorized guest of a crew member, due to a defectively affixed stairway canvas runner, constitutes a maritime tort requiring the exclusive application of federal maritime law?

2. Assuming the applicability of federal maritime law, was respondent under a duty to the petitioner to provide a seaworthy vessel? Did the Courts below err in refusing to apply the doctrine of unseaworthiness?

3. Assuming the applicability of federal maritime law, the doctrine of unseaworthiness aside, what was the scope of the duty owed to the petitioner to determine whether respondent was negligent?

(a) Should federal maritime law require from the shipowner a single standard of care for all authorized visitors aboard the vessel—or does it adopt the common law distinction between licensee and invitee?

(b) Assuming that the federal maritime law perpetuates the common law distinction between licensee and invitee, did the Courts below err in refusing to hold that petitioner was an invitee?

(c) Assuming that the Courts below properly found that petitioner was a licensee, was there sufficient evidence to support the verdict for the petitioner under the charge which the Trial Court gave to the jury? Do the decisions of the Courts below constitute improper interference with the jury verdict?

Summary of Argument

I—The basis of this action is a maritime tort and federal maritime law, not state or common law, should apply. The Trial Court, therefore, erred in refusing to apply the doctrines of comparative negligence and unseaworthiness. It also indicated confusion as to the admiralty jurisdiction of the Court on the civil side. *Pope & Talbott v. Hawn*, 346 U.S. 706 resolved these issues, but the District Court refused to follow, and the majority of the Court of Appeals failed to correct. Hence, the need for a definitive adjudication as to the definition of a maritime tort and the applicability of federal maritime law on the civil side of the Court, whether or not diversity is present where maritime tort is involved.

II—The application of the doctrine of unseaworthiness has resulted in decisional conflict and confusion. The majority and minority opinions below reflect two divergent views: The restrictive "ship's work" theory which would limit the doctrine only to those doing work essentially of a seaman's nature; the more liberal approach which would extend the doctrine to all lawfully present shipboard visitors. The issue is before this Court for the first time. The majority below erred in refusing to apply the doctrine to licensees. This Court should not now engraft upon the federal maritime law the repudiated common law categories of invitee and licensee (Point III, A). For the same reason, it should not now similarly burden the doctrine of unseaworthiness.

III—Whether found to be an invitee or licensee, respondent was negligent.

A—This Court has never definitively decided whether the rigid common law categories of invitee and licensee are part of the federal maritime law. Under its unique, constitutionally vested, judicial lawmaking powers to declare the maritime law, this Court may refuse to accept this concept as it previously refused to accept the doctrine of contributory negligence. Both are harsh rules incompatible with modern admiralty policy. The English Occupiers' Liability Act of 1957 has done away with the distinction between invitee and licensee in favor of a single standard of due care. This Court should act similarly in furtherance of a progressive maritime law.

B—If the federal maritime law does recognize the distinction between invitee and licensee, petitioner was in fact an invitee to whom respondent owed a duty of reasonable care. The development of this point is essentially the same as in the dissenting opinion. There is no body of precedent that a social guest of a seaman is a licensee. Kermarec's presence on the vessel satisfies both the "invitation" and "economic benefit" criteria in determining his status as an invitee.

C—Even if petitioner is held to be a licensee, respondent breached its duty. There was ample evidence of a dangerous condition. The Courts below palpably erred when they limited their finding solely to the inadequacy of the carpet tacks. Respondent is chargeable with knowledge of the condition of the stairway because Bourdon, its employee, created the condition in the regular course of his employment. Respondent's liability can, therefore, be predicated either upon the "negligent activity" or "condition of the prem-

ises" theories. There was evidence to support the jury verdict. Setting it aside was an improper interference with the jury function. The verdict should be reinstated.

ARGUMENT

I.

The Basis of This Action Is a Maritime Tort Requiring the Exclusive Application of Federal Maritime Law. The Application of New York Law Was Therefore Error.

Pope & Talbot, Inc. v. *Hawn*, 346 U.S. 406, 74 S.Ct. 202, should have resolved any residual doubt as to (a) what constituted a maritime tort; (b) the "necessary dominance" of the general maritime law doctrines of comparative negligence and unseaworthiness over any contrary state law, where a maritime tort was involved[3] and (c) the applicability of these admiralty principles notwithstanding that jurisdiction was based on diversity and that the case was brought on the law side of the Court to be tried before a jury.[4]

Yet, in the case at bar, the Trial Court refused to find that the subject matter of Kermarec's action was a maritime tort. Accordingly, it refused to apply the principles of comparative negligence and unseaworthiness, and it

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[3] The terms "federal" and "general" maritime law are used synonymously and refer to those "• • • federal maritime policies • • • (and) substantial admiralty rights as defined in controlling Acts of Congress or by interpretative decisions of this Court." *Pope & Talbot, Inc.* v. *Hawn, supra*, p. 410. See also *O'Donnell* v. *Great Lakes Co.*, 318 U.S. 36, 40, 63 S.Ct. 488, 490; *The Lottawanna*, 88 U.S. 558.

[4] See also, *Panama R. Co.* v. *Johnson*, 264 U.S. 375, 391, 44 S.Ct. 391, 395, and *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 88-89, 66 S.Ct. 872, 874.

expressed uncertainty as to whether petitioner's right to invoke these principles was not otherwise forfeited because the suit was tried to a jury on the law side of the Court. Because of these misconceptions, the Court felt obliged to apply the law of New York (R. 74-77).

The majority of the Court of Appeals, except for its specific ruling on the issue of unseaworthiness, did not deem it necessary to correct these errors. Thus it remained silent as to whether a maritime tort was here involved; whether it was non-prejudicial error to have applied the New York law of absolute contributory negligence, and it expressed no opinion as to whether admiralty principles could be invoked only on the admiralty side of the Court. Nor is it clear from the opinion, moreover, whether its affirmance that petitioner was a licensee who had failed to prove respondent's actual knowledge of a dangerous condition, was based on its interpretation of New York law, or, whether it was declaring this to be the applicable federal maritime law principle.

A definitive resolution of these issues is urgently needed for several reasons. Any lingering uncertainty at this late date as to what constitutes a maritime tort and whether in a case involving such tort the federal maritime law must be applied, whether on the law or admiralty side of the Court, will result only in needless error and unnecessary appellate litigation. In this connection we respectfully submit that in the interest of maximum certainty and uniformity in the application of admiralty doctrine, this Court should no longer withhold its judgment as to whether diversity of citizenship is essential to the jurisdiction of a District Court to try a maritime tort which does not involve a federal statute.[5] Finally, as we shall show at a later

[5] "In this situation we need not decide whether the District Court's jurisdiction can be rested on 28 U.S.C. § 1331, 28 U.S.C.A. § 1331, as arising 'under the Constitution, laws or treaties of the

point, this Court now has the opportunity, in its discretion, to eliminate the confusion-ridden doctrine of "invitee" and "licensee" and to adopt as part of the general maritime law a single standard of care for all lawfully present persons who are injured as a result of a maritime tort.

Kermarec's complaint necessarily invoked the admiralty and maritime jurisdiction of the District Court and tendered a maritime tort for adjudication. He was injured on an ocean-going vessel; the vessel was in navigable waters; a member of the crew, in a foreign port, had requested and obtained permission for Kermarec to visit him. The accident was attributed to a defectively affixed and maintained ship's appurtenance, i.e., a canvas runner fastened to a ship's stairway to keep it clean between voyages pending the embarkation of the ship's passengers. The complaint sounded in negligence and unseaworthiness.

That the vessel was within New York waters and was not in actual navigation at the time of the accident are not controlling considerations. Nor is it necessary in this case, though otherwise desirable, to determine "whether location in navigable waters was alone sufficient to make a tort 'maritime' or whether further nautical flavor was required."[6] Under either test, the subject matter of petitioner's suit constituted a maritime tort. *Leathers* v. *Blessing*, 105 U.S. 626; *Atlantic Transport Co.* v. *Imbrovek*, 234 U.S. 52, 34 S.Ct. 733; *Pope & Talbot Inc.* v. *Hawn, supra*, p. 409.

If petitioner's suit does in fact involve a maritime tort, extended discussion should be unnecessary to establish

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United States.' See *Doucette* v. *Vincent*, 1 Cir., 194 F.2d 834 and *Jansson* v. *Swedish American Lines*, 1 Cir., 185 F.2d 212, 30 A.L.R. 2d 1385. *Cf. Jordine* v. *Walling*, 3 Cir., 185 F.2d 662." *Pope & Talbot, Inc.* v. *Hawn, supra*, p. 410, ftn. 4.

[6] *Kermarec* v. *Compagnie Generale Transatlantique*, 2 Cir., 245 F.2d 175, 180.

the ancillary principle that such tort is to be adjudicated solely by reference to federal maritime law and not by application of the forum state law. "The complaint * * * shows that the claim rests on a maritime tort which under the Constitution is subject to dominant control of the Federal Government."[7] "In many other cases this Court has declared the necessary dominance of admiralty principles in actions in vindication of rights arising from admiralty law."[8] "While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling Acts of Congress or by interpretive decisions of this Court."[9] This is not in derogation of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64.

> "The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. * * * So here, in trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected."[10]

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[7] *Pope & Talbot Inc.* v. *Hawn, supra*, p. 410 ftn. 4.

[8] *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 244, 63 S.Ct. 246, 250.

[9] *Pope & Talbot Inc.* v. *Hawn, supra*, pp. 409-410.

[10] *Garrett* v. *Moore-McCormack Co., supra*, p. 245.

II.

Since a Maritime Tort Is Present and Federal Maritime Law Is Applicable, Respondent Was Under a Duty to Provide Petitioner With a Seaworthy Vessel. The Courts Below Erred in Refusing to Apply the Doctrine of Unseaworthiness.

The shipowner's absolute duty to provide a seaworthy vessel and to indemnify persons injured in consequence of a breach of such duty is an established concept of admiralty law, notwithstanding its ancient and "perhaps unascertainable" origins.[11] In England, seamen first obtained the protection of this "humanitarian policy" in 1876;[12] in this country not until 1903. Since *The Osceola*, the application of the doctrine has required the attention of this Court on several occasions. Thus far the principle adjudications have established that it is not limited solely to the immediate employees of the shipowner, but extends to other categories of workers who are injured in the service of the vessel;[13] it is immaterial whether the unseaworthy condition was latent or could have been avoided by due diligence;[14] or that the unseaworthy appliance was not part of the ship's equipment but was brought aboard by an independent contractor.[15]

Two basic considerations have motivated these recent decisions: (a) the hazardous nature of marine operation remains unchanged, but with modern specialization of labor,

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[11] *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 91, 66 S.Ct. 872, 875.

[12] *The Osceola*, 189 U.S. 158, 171; 23 S.Ct. 483, 487 (1903).

[13] *Seas Shipping Co.* v. *Sieracki, supra; Pope & Talbot Inc.* v. *Hawn, supra.*

[14] *Mahnich* v. *Southern SS Co.*, 321 U.S. 96, 64 S.Ct. 455.

[15] *Alaska Steamship Co.* v. *Petterson*, 347 U.S. 396, 74 S.Ct. 601.

many different categories of workers are now exposed to the dangers which originally confronted seamen only;[16] (b) the brunt of the loss to the victim of an unseaworthy vessel and his dependents should be assumed by the shipowner because of his ability to distribute the loss over the industry. Otherwise, unable to discover or remove the cause of the evil, the person injured might not recover under ordinary rules of negligence.[17]

The application of these principles, however, has resulted in some degree of uncertainty as to the ultimate scope of the doctrine. The current decisions are in conflict and the conflict, in the main, stems from a restrictive and exclusive application of the first of the two premises. Where the lower courts have adopted the "ship's work" criterion as the sole test, an unseaworthy vessel and its owner have been exonerated,[18] unless "the work on which the plaintiff

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[16] "These and other considerations arising from the hazards which maritime service places upon men who perform it, rather than any consensual basis of responsibility, have been the paramount influences dictating the shipowner's liability for unseaworthiness as well as its absolute character. * * * this policy is not confined to seamen who perform the ship's service under immediate hire to the owner, but extends to those who render it with his consent or by his arrangement. * * * The risks themselves arise from and are incident in fact to the service, not merely to the contract pursuant to which it is done." *Seas Shipping Co.* v. *Sieracki*, pp. 94-95.

[17] "These (hazards of marine service), together with their helplessness to ward off such perils and the harshness of forcing them to shoulder alone the resulting personal disability and loss, have been thought to justify and to require putting their burden, in so far as it is measurable in money, upon the owner regardless of his fault. Those risks are avoidable by the owner to the extent that they may result from negligence. And beyond this he is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost." *Seas Shipping Co.* v. *Sieracki*, *supra*, pp. 93-94.

[18] *Berryhill* v. *Pacific Far East Lines*, 9 Cir. 1956, 238 F.2d 385, cert. den. 354 U.S. 938, 77 S.Ct. 1400. Shoreside machinist injured on drydocked vessel by grinding wheel furnished by employer which disintegrated while repairing propulsion machinery. Doc-

was engaged was of a kind that the crew of a vessel was accustomed to perform."[19] Where, however, the Courts have not attempted to match or sought equivalence in the operating requirements of ancient and modern maritime service, the test applied has been simply lawful presence on

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trine of unseaworthiness held not applicable because person injured was not doing ship's work "to be performed historically or currently by the crew" p. 387. The same Court in *Petterson* v. *Alaska S.S. Co.*, 9 Cir. 1953, 205 F.2d 478, affd. per curiam 347 U.S. 396, 74 S.Ct. 601 (1954) had permitted recovery to a longshoreman injured by a defective block which his employer had brought aboard the vessel. Cf. *Read* v. *United States*, 3 Cir. 1953, 201 F.2d 758 holding warranty extended to "business guest" engaged in changing a Liberty ship into a transport because of "failure to supply and keep in order the proper appliances appurtenant to the ship" p. 762. Per contra, *Berge* v. *Nat'l Bulk Carriers Corp.*, 2 Cir. 1958, 251 F.2d 717, cert. den. 78 S.Ct. 994, where a sheared shackle pin, admittedly unseaworthy, did not make shipowner liable, because vessel was undergoing "virtual rebuilding" and "reconstruction of a ship was not traditionally the task of the crew" p. 718. In accord, *Raidy* v. *U. S.*, 4 Cir. 1958, 252 F.2d 117 affg. 153 F.Supp. 777; *West* v. *U. S.* (D.C.E.D. Pa. 1956), 143 F. Supp. 473, 479. *Halecki Admx.* v. *United N. Y. & N. J. S. H. P. Assn.*, 2 Cir. 1958, 251 F.2d 708, cert. granted June 9, 1958. Shoreside repairman engaged in cleaning engine room of pilot boat, drydocked for annual repairs, died of tetrachloride poisoning. Recovery allowed because deceased's activities were essentially crew work "and as to that it makes no difference that the means employed have changed with time" p. 711. See also: *Lester* v. *U. S.*, 2 Cir. 1956, 234 F.2d 625, 629, cert. den. 352 U.S. 889, 77 S.Ct. 130. *Imperial Oil, Ltd.* v. *Drlik*, 6 Cir. 1956, 234 F.2d 4, 8, where Court found that doctrine extended to a shoreside electrician and shipyard worker on a drydocked vessel, but found no unseaworthy condition. In *Union Carbide Corp.* v. *Goett*, 4 Cir. 1958, 256 F.2d 449, a sandblaster was denied recovery because a vessel, drydocked for repairs and structural changes, could not be seaworthy, following the *Berge*, *Raidy* and *Lester* decisions, *supra*. In *McDaniel* v. *Lisholt*, 155 F.Supp. 619 (D.C.S.D.N.Y. 1957) affd. 2 Cir. 1958, —— F.2d ——, a Canal Zone fireman injured by an explosion on a previously fire-disabled vessel, was denied recovery because he was not performing any traditional or customary work of a seaman.

[19] *Berge* v. *National Bulk Carriers Corp.*, *supra*, p. 718.

the vessel with the owner's consent or by his arrangement.[20] The majority and minority opinions of the Court below reflect this divergence and it is assumed that certiorari was granted in the instant case in order that this issue might be finally resolved.

The majority of the Court below, in denying Kermarec the protection of a seaworthy stairway declared " . . . We cannot say that this guest of a member of the crew, who came aboard for a social visit, even with the owner's acquiescence, should be classed as a seaman and entitled to sue for unseaworthiness" p. 178. The Court was thus limiting its application of the *Sieracki* and *Hawn* decisions solely to those shoreside workers who demonstrably were engaged in activity previously performed by seamen. For the Court also stated "Kermarec did not make any contribution to the ship's safety, preservation or progress; he did not submit his life and safety to the ship as a seaman does; he did not load her for voyage as a stevedore does; consequently he does not have any right to recover for unseaworthiness" p. 178.

This Court could not have intended so narrow and unrealistic a limitation of the principle. Were it to have done

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[20] *Ross* v. *Steamship Zeeland*, 4 Cir. 1957, 240 F.2d 820. Night watchman employed by port service injured by coil of wire on tween deck which was inadequately illuminated. "It (the vessel) was not reasonably fit to permit libellant to perform his task with reasonable safety" p. 823. *Amerocean Steamship Company* v. *Copp, Jr.*, 9 Cir. 1957, 245 F.2d 291. Rigger on vessel drydocked for refurbishing slipped on oily deck. Recovery allowed. "Any vestiges of immunity from liability for negligent acts toward outsiders who are not seamen have disappeared" p. 293. *Byrd* v. *Napoleon-Avenue Ferry Co.*, 125 F.Supp. 573 (D.C.E.D. La. 1954), aff'd 5 Cir. 1955, 227 F.2d 958, cert. den. 351 U.S. 925, 76 S.Ct. 783. Recovery allowed to injured passenger on unseaworthy ferry. *Caudill* v. *Victory Carriers Inc.*, 149 F.Supp. 11, 15 (D.C.E.D. Va. 1957). Doctrine applied to soldier assigned to a floating crane and injured descending defective Jacob's ladder of defendant's vessel, used for access to crane from the vessel.

so, the anarchic living and working conditions of seamen which prevailed on the sailboat would now determine and circumscribe those who require the same protection, even more so, in the era of the atom-powered vessel.[21] But assuming, as we must, that this Court intended no such dead-hand shackling, and opened the benefits to all ship workers, regardless of their activity or the nature of their employment, what of the host of shipboard visitors, whose presence on the vessel is not immediately related to its operation? Was it intended to deny the protection of a seaworthy vessel to the governmental agency inspector, i.e., Custom House, Coast Guard, Immigration, etc.,[22] or to the marine insurance claim investigator, the labor union representative, the ship's passenger[23] and his guests, cargo agents, the family and friends of the crew members, who, because of modern quick turn-around voyages, might not have time to leave the vessel? This question we believe is tendered to the Court for the first time.

Three answers are possible: (a) the absolute liability of a shipowner for an unseaworthy vessel is to be limited only to workers performing a "ship work" function; (b) it extends also to those who under common law would be classified as "business invitees" but not to "licensees"; (c) it extends to all who are lawfully present on the vessel.

We submit that logic as well as the "urgent and sound reasons of public policy" which initially gave rise to the

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[21] See excellent summary by Parker, J. in *The State of Maryland*, 4 Cir. 1936, 85 F.2d 944, of the new age of navigation and its requirements.

[22] *McDaniel* v. *The Lisholt*, 155 F.Supp. 619 (S.D.N.Y. 1957) affd. —— F.2d —— (2 Cir. July 10, 1958) where a Canal Zone fireman was denied recovery.

[23] *Byrd* v. *Napoleon Ave. Ferry Co.*, 125 F.Supp. 573 (E.D. La. 1954) affd. 5 Cir. 1955, 227 F.2d 958, cert. den. 351 U.S. 925, 76 S.Ct. 783, where recovery was allowed.

doctrine of unseaworthiness, dictate the adoption of the last formulation. Otherwise, the law would permit the irrational result that the same defectively affixed canvas runner could create different degrees of liability dependent solely upon the wholly fortuitous circumstance that it was a crew member, or a longshoreman and not Kermarec who was injured when the canvas gave way. Thus, had Yves and Kermarec been injured simultaneously, the majority of the Court below would have had to hold that Yves, alone, could recover. To limit the doctrine solely to "ship workers" would ignore the many non-manual services which are both required by and imposed upon the shipowner in order to conduct safely a modern maritime operation. It would compel the Courts, moreover, in slow, piecemeal fashion, to analogize every injured worker's activity in terms of the original function of seamen in a pre-industrial era.[24] The inevitable conflict in the findings would perpetuate the current uncertainty and decisional disharmony, the elimination of which has been the historic function of admiralty law. To extend the doctrine to "business invitees" would be a welcome clarification. But, as we shall develop in a later point, it would import into the field of admiralty the needless confusion which has totally destroyed the utility of the invitee-licensee concept at common law. It would also produce the rather anomalous result that the injured invitee would be given the added protection of the shipowner's absolute liability, whereas the less legally protected licensee would be denied it. Finally, if it be sound public policy to

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[24] Judicial resistance to *Alaska Steamship Co.* v. *Petterson*, 347 U.S. 396, 74 S.Ct. 601, is reflected in the "structural alteration" limitation adopted recently in *Berge* v. *Nat'l Bulk Carriers*, *Berryhill* v. *Pacific Far East*, *Raidy* v. *U. S.*, *Lester* v. *U. S.*, *Union Carbide* v. *Goett* and *Imperial Oil* v. *Drlik*, *supra*, ftn. 18. This issue is not involved here. Kermarec was injured on a functioning vessel. *Quaere*, however, whether antipathy to any further extension of the doctrine of unseaworthiness has not obscured the essential determinant in these cases—has a maritime tort occurred? This and not the nature or extent of ship repairs should control.

compel the shipowner to provide a seaworthy vessel for any specific group of workers, that duty realistically is not enlarged, but its salutory purpose is that much more effectively achieved by extending the duty to all persons who may be exposed to the same marine peril.

In *Byrd* v. *Napoleon Avenue Ferry Co., supra,* the Court declared:

> "It is true that in Pope & Talbot, the plaintiff was a ship repairman, whereas here libellant was a passenger on a ferry. Nevertheless, the basis of her action, like Hawn's, was maritime tort and *there is nothing in Pope and Talbot which would limit its application to maritime tort relating only to ship repairmen*" p. 577. (Emphasis added.)

In *Caudill* v. *Victory Carriers, supra,* the Court went further and stated:

> "The day may come, if it has not already arrived, when the *doctrine of unseaworthiness will be extended to all business invitees aboard ship,* for Sieracki holds that liability arises as an incident of performing the ship's service with the owner's consent" p. 15. (Emphasis added.)

In neither case, it is submitted, did the Court go far enough. For the essential justification of the doctrine is best formulated in the reasoning of Chief Judge Clark in his dissenting opinion below.

> "While it is true that the Supreme Court referred to the type of work done by Hawn as one reason for allowing him to recover for unseaworthiness, I do not believe performance of 'ship's work' is a *sine qua non* to recovery on that theory. The Sieracki case, which Pope & Talbot, Inc., followed, gave as the reason for

extending the unseaworthiness doctrine to certain non-seamen the similarity of such individuals to seamen as regards exposure to the same dangerous appliances, inability to bear the expense of injury, inability to discover or remove the dangerous condition, inability to recover for the loss from their employer, and inability to distribute the loss to the shipping industry as well as the shipowner. Seas Shipping Co. v. Sieracki, supra, 328 U.S. 85, 95-96, 66 S.Ct. 872, 90 L.Ed. 1099. Plaintiff meets these criteria" p. 183.

III.

Whatever Standard of Care Was Due Petitioner, Respondent Was Negligent.

A. Where, as Here, Federal Maritime Law Is Exclusively Applicable, the Judicial Law-Making Powers of This Court Can and Should Be Exercised as a Matter of Public Policy, to Eliminate All Distinctions Between "Invitee" and "Licensee" and This Court Should Substitute a Single Standard of Due Care for All Authorized Shipboard Visitors.

This Court has never definitively decided the applicable standard of care due an authorized shipboard visitor. Nor has it made any clear pronouncement adopting and incorporating the rigid common law categories of licensee/invitee into the federal maritime law. *Leathers* v. *Blessing*, 105 U.S. 626, 629 (1881). See, *Aho* v. *Jacobsen*, 1 Cir. 1957, 249 F.2d 309, 313 (cert. pending). The instant case affords an opportunity, therefore, for a further contribution of maritime law towards a liberal and socially responsive American jurisprudence.

That this Court is empowered to declare the general maritime law, and in its discretion to reject contrary state

or common law, cannot be questioned.[25] "The question as to the true limits of maritime law and admiralty jurisdiction is undoubtedly * * * exclusively a judicial question." [26] The power is derived from the Constitution[27] and the Judiciary Act of 1789.[28] Accordingly, "the main source of maritime law" has been the decisions of this Court.[29] Thus, it has rejected the common law rule of contributory negligence as an absolute defense and enforced the principle of comparative fault.[30] It has adopted and extended the rule of liability without fault for unseaworthiness and maintenance and cure without regard to the common law doctrines of assumption of risk or the fellow servant rule.[31] "In many other cases this Court has declared the necessary dominance of admiralty principles in actions in vindication of rights arising from admiralty law." [32]

It is submitted that the time is long overdue for discarding the licensee-invitee categories in favor of a single stand-

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[25] *The Lottawanna*, 88 U.S. (21 Wall.) 558; *O'Donnell* v. *Great Lakes Co.*, 318 U.S. 36, 40-41, 63 S.Ct. 488, 491; *Pope & Talbot Inc.* v. *Hawn*, *supra*, pp. 409-410.

[26] *The Lottawanna*, *supra*, pp. 575, 576.

[27] Art. III, § 2.

[28] § 9, 1 Stat. 76; 28 U.S.C. 1333.

[29] *Pope & Talbot* v. *Hawn*, *supra*, p. 418.

[30] *The Max Morris*, 137 U.S. 1, 14-15; *Chelentis* v. *Luckenbach SS Co.*, 247 U.S. 372, 382-384, 38 S.Ct. 501; *Pope & Talbot* v. *Hawn*, *supra*, pp. 408-411.

[31] *The Osceola*, *supra*, p. 175; *Mahnich* v. *Southern SS Co.*, *supra*, pp. 102-104; *Warren* v. *U. S.*, 340 U.S. 523, 529-30, 71 S.Ct. 432. *Seas Shipping* v. *Sieracki*, *supra*, pp. 89-96; *Alaska SS Co.* v. *Petterson*, *supra*, pp. 401-402. See also *Cox* v. *Roth*, 348 U.S. 207, 210, 75 S.Ct. 242.

[32] *Garrett* v. *Moore-McCormack Co.*, *supra*, p. 244, citing *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205; *Chelentis* v. *Luckenbach SS Co.*, *supra*; *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149, 159; *Carlisle Packing Co.* v. *Sandanger*, 259 U.S. 255, 259; *Messel* v. *Foundation Co.*, 274 U.S. 427, 434.

ard of care for all persons lawfully on the premises. It may now be too late to accomplish this in the civil law, except by remedial state legislation. But within the sphere of the general maritime law, this Court is unencumbered by precedent and may in its discretion refuse to engraft upon the maritime law an ancient concept which has outlived whatever justification it originally possessed.

In determining the advisability of establishing one standard of care for all authorized shipboard visitors, the Court will undoubtedly take judicial notice that the present status of the common law in this area is characterized by confusion, conflict and contradiction, often within the same jurisdiction or court. Predictability and uniformity —especially significant in admiralty[33]—have no place in the current maze. The just decision today is frequently impossible except through such skillful use of semantics as to recall Mr. Justice Cardozo's comment "discrimination so subtle is a feat beyond the compass of ordinary minds." [34]

It is true, as Chief Judge Clark remarked, that the "distinctions (invitee, licensee and trespasser) have been more and more obscured during the last century as Courts have moved toward imposing on owners and occupiers a single duty of reasonable care in all the circumstances." [35] But the very fact that his appeal to reason came in dissent, points up the need to exorcise a concept feudal in origin and rooted in class privilege.[36]

The chaotic state of the common law in the area of the occupier's liability to the invitee and licensee is strikingly

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[33] *The Lottawanna, supra,* p. 575.

[34] *Shepard* v. *United States,* 290 U.S. 96, 104, 54 S.Ct. 22, 25.

[35] *Kermarec* v. *Compagnie Generale Transatlantique, supra,* p. 180.

[36] 2 *Harper & James, The Law of Torts,* § 27.1, p. 1432 (1956). See also *Aho* v. *Jacobsen, supra,* pp. 311-312.

illustrated by a comparison of the cases."[37] The extended footnote appended to this brief is not intended to be comprehensive or exhaustive. Rather, it is intended to highlight some of the glaring conflicts and contradictions, which this Court would inevitably perpetuate, were it to apply the licensee-invitee concepts to the case at bar.

In this connection we respectfully call the Court's attention to the passage of the Occupiers Liability Act, 1957 (5 & 6 Eliz. 2c. 31) which has finally abolished the distinction between licensee and invitee in favor of a single standard of duty.

The Act had been preceded by sharp criticism of the state of the law in England.

> "The law on the whole subject is still in a confused state. The delimitation between the different categories (sc. of persons entering on premises occupied by others) is far from settled, nor is it possible to state with certainty the duties owed to persons falling within those categories. Had it been earlier and more generally recognised that the topic is only one branch of the law of negligence it might have been seen that the occupier's duties cannot conveniently be put into strait jackets to fit the character in which the plaintiff comes on to the premises and the law would then have been freed of some needless refinements and profitless distinctions." *Salmond on Torts*, 10th ed at p. 471.[38]

The enactment had been recommended in the "Third Report of the Law Reform Committee (1954)," a body of leading

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[37] See Appendix.

[38] For a more tolerant attitude see *Pollack on Torts*, 15 Ed. pp. 409-410 (1951).

English jurists who found the common law concepts entirely unnecessary and in some aspects even absurd.[39]

> "It is, indeed, really impossible without lapsing into absurdities to adhere strictly to the criterion of actual knowledge: nor in our view is it a desirable test. It seems to us to put a premium on negligence. An occupier who inspects his property periodically may actually know of dangers of which an occupier so careless that he never inspects may remain ignorant. Thus the 'mere licensee's' prospect of recovering damages from some injury sustained through a defect in the premises may vary with the occupier's habits as regards inspection. If the occupier is so negligent as never to inspect at all, he may not know of the trap which causes the damage, in which case the mere licensee has no remedy. If the occupier takes the trouble to inspect from time to time he may know of the trap, in which case, if he has omitted to warn the mere licensee of its presence, the latter on suffering damage from it has a good cause of action. We cannot think it is satisfactory to make the injured licensee's position depend on the idiosyncrasies of the particular occupier." Law Reform Committee, Third Report, pp. 31-32.

The Occupiers Liability Act of 1957 establishes a single standard of duty toward all persons who visit the premises of the occupier upon his invitation or with his consent. This duty is defined in the following terms:

> "The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is

[39] Copies of the Act and Law Reform Committee Report have been deposited with the Clerk for the Court's convenience.

invited or permitted by the occupier to be there." Sec. 2 (2).

The Act further provides that the single standard of care is applicable to regulate

> "the obligations of a person occupying or having control over any fixed or moveable structure, *including any vessel*, vehicle or aircraft." Sec. 1 (3)(a). (Emphasis added.)

The disability of the licensee *vis à vis* his host rests upon two assumptions: (a) he assumes the risk that the premises may be dangerous, and (b) if injured, is contributorily negligent because he voluntarily exposed himself to this risk.[40]

We suggest this formulation only to demonstrate that the issue now before the Court was in fact resolved when the Court refused to incorporate the common law defense of contributory negligence into the general maritime law. Its reasoning then is equally applicable now:

> "The harsh rule of the common law under which contributory negligence [a licensee's legal disability] wholly barred an injured person from recovery is completely incompatible with modern admiralty policy and practice. Exercising its traditional discretion, admiralty has developed and now follows its own fairer and more flexible rule which allows such consideration of contributory negligence in mitigation of damages [the safety of the premises and of all the circumstances attending an injury to a lawful visitor] as justice requires. Petitioner presents no persuasive arguments that admiralty should now adopt a discredited doctrine

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[40] 2 *Harper & James, The Law of Torts*, 1956, p. 1162.

which automatically destroys all claims of injured persons who have contributed to their injuries in any degree, however slight [solely by reason of the fortuitous nature of their lawful visit]."[41] (Interpolations added.)

B. Even if the Federal Maritime Law Recognizes a Distinction Between Invitee and Licensee, Appellant Was an Invitee to Whom Respondent Owed a Duty of Reasonable Care.

Should the common law distinction between invitee and licensee be held to apply to federal maritime law,[42] the appellant is still entitled to recovery since the evidence was sufficient to establish that he was an invitee on respondent's vessel.

The majority of the Court below rests its conclusion on three erroneous assumptions. Kermarec was not an invitee, it declared, because (a) the law "has long been settled that the guest of a seaman is nothing more than a licensee" p. 177; hence it could not consider any "novel question." (b) Precedent aside, only a business visitor can be an invitee. Since a shipowner derives no economic benefit from the social guest of a crew member, the guest by definition, cannot be an invitee. (c) Were the Court free to consider the analogy of a landlord's duty to the guest of a tenant, it would reject it as inapplicable because a shipowner is not a landlord and his "relationship to his seamen is very different from that of a landlord to his tenant" p. 177.

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[41] *Pope & Talbot Inc.* v. *Hawn, supra,* pp. 408-409.

[42] *McDaniel* v. *The Lisholt, supra,* p. 627; *Kermarec* v. *Compagnie Generale Transatlantique, supra,* p. 177; *Aho* v. *Jacobsen, supra,* p. 311. Cf. *Leathers* v. *Blessing, supra,* p. 629 with *The Sudbury,* 14 F.2 533 (D.C. Ore. 1926).

The dissenting opinion below exposes the fallacies:

First: "Economic benefit" is not the sole criterion in determining an invitee status. "Invitation," of whatever nature, equally controls. "If invitation is the touchstone, it must be shown that persons authorized by the defendant led the plaintiff to believe that the owner intended the premises to be used by visitors for this purpose and adopted the premises for that use" p. 180.

In *Gunnarson* v. *Robert Jacob, Inc.*, 2 Cir. 1938, 94 F.2d 170, cert. den. 303 U.S. 660, reh. den. 304 U.S. 588, Judge Learned Hand recognized this dualism.

> "The doctrine is well settled; the relation with its resulting duty arises only when the person who enters the premises does so in the interest of the owner, *or upon some business of his own, of which the owner has notice and to an entry in pursuit of which he consents, directly or indirectly*" p. 171. (Emphasis added.)

This formulation of the alternative test was not new. In *Cooley, Law of Torts*, 3rd ed. (1906) Vol. 2, p. 1259, the same statement of the law is found:

> "When one expressly or by implication invites others to come upon his premises whether for business *or for any other purpose*, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises safe for the visit." (Emphasis added.)

Second: There is no body of precedent that the social guest of a seaman is a licensee. The cases cited by the majority are distinguishable, as Chief Judge Clark demonstrated, by the absence of both elements, i.e., there was neither "invitation" nor "economic benefit."

Third: In the instant case, Kermarec was an invitee because he met both requirements. There was "invitation" because the shipowner had expressly authorized his visit, by the issuance of an official visitor's pass. The shipowner here, therefore, unlike those in the cases cited by the Court below, had notice of Kermarec's intended visit, and had consented to it. This was an implied if not an express invitation,[43] which alone could create an invitee status despite the absence of any economic benefit to the shipowner.[44]

There was also "economic benefit" to the respondent from Kermarec's visit, albeit of an indirect nature. We need not expand on the cogent reasoning of Chief Judge Clark which led him to this conclusion. "In view of the shipowner's liability to the seaman for injuries suffered in shoreside recreation, it is in the owner's economic interest to encourage recreation aboard ship, rather than ashore, thus making the seaman's activities subject to control and the men available on ship whenever needed."[45] Nor is there

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[43] Should it make any difference whether the host or guest initiates the invitation provided it is accepted?

[44] *Radoslovitch* v. *Navigazione Libera Triestina, S.A.*, 2 Cir., 72 F.2d 367; *Griffiths* v. *Seaboard Midland Petroleum Co.*, 33 A.M.C. 911; Cf. *The Francesca* (D.C.W.D.N.Y.), 37 A.M.C. 1006; *The Cayuga*, 9 Cir., 37 A.M.C. 203; *McLaughlin* v. *Mulqueen* (D.C. E.D.N.Y.), 29 A.M.C. 1626. See, also, *Tide Water Associated Oil Co.* v. *Richardson*, 9 Cir. 1948, 169 F.2d 802, 803. Coast Guard seaman whose "duty to make his inspection was known to the mate • • • as was the likelihood of (plaintiff's) passing thru the curtained opening toward the nearby unguarded hatch in the discharge of that duty"; *Quinn* v. *Staten Island R.T. Ry. Co.*, 224 N.Y. 493, 496 (1918). Coal barge captain injured on defendant's dock had "implied invitation" to go ashore to attend church services. *Phillips* v. *United States*, 102 F.Supp. 943, 946 (E.D. Tenn. 1952). Plaintiff injured in pass office of Oak Ridge Reservation, where she was seeking a pass to investigate her son's accident in the reservation, was invitee.

[45] P. 181, citing *Warren* v. *United States*, 340 U.S. 523, 71 S.Ct. 432; *Aguilar* v. *Standard Oil Company*, 318 U.S. 724, 63 S.Ct. 930; *Farrell* v. *United States*, 336 U.S. 511, 69 S.Ct. 707 and *Nowery* v.

any logic in labelling the guest of a passenger an invitee, but refusing such status to the guest of a seaman. *McCann* v. *Anchor Line*, 2 Cir. 1935, 79 F.2d 338, *Voirin* v. *Compagnie Generale Transatlantique (The Champlain)*, 151 Misc. 498, 270 N.Y.S 643, 1934 A.M.C. 25. In the maritime cases particularly, "economic benefit," though slight and most indirect, has been held sufficient as a matter of law and policy, to clothe the plaintiff with the status of invitee.[46] "It is not necessary that the visitor should himself be upon the land for the purposes of the possessor's business. The visit may be for the convenience or arise out of the necessities of others who are themselves upon the land for such a purpose" 2 Restatement of Torts, § 332, comment d, 1934, p. 990.

Fourth: The vessel, for all practical purposes, is a seaman's home and the tenant-guest-landlord analogy is pertinent.

> "Unlike men employed in service on land, the seaman, when he finishes his day's work, is neither relieved of obligations to his employer nor wholly free to dispose of his leisure as he sees fit. Of necessity,

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Smith (D.C.E.D. Pa.), 69 F.Supp. 755, affd. 3 Cir., 161 F.2d 732. It is not generally appreciated that even when in port, seamen may not have adequate opportunity for their personal affairs. Vessels, today, keep tight schedules, particularly the tanker and passenger. The short turn-around in port frequently compels the seaman to see his family and friends on the vessel or pier. In fact, this is encouraged by the shipowner to avoid lateness and last minute crew shortages requiring "pier-head jumps."

[46] *Griffiths* v. *Seaboard Midland Petroleum Corp., supra; Radoslovitch* v. *Navigazione Libera Triestina S.A., supra; Middleton* v. *P. Sanford Ross Inc.*, 5 Cir. 1914, 213 F.6; *New York Lubricating Oil Co.* v. *Pusey*, 2 Cir. 1914, 211 F. 622. See also *Quinn* v. *Staten Island R.T. Ry. Co., supra; McFall* v. *Compagnie Maritime Belge*, 304 N.Y. 314 (1952) and cases in the Appendix where economic benefit in diverse situations similar to and often weaker than the case at bar was found to justify recovery for an invitee.

during the voyage he must eat, drink, lodge and divert himself within the confines of the ship. In short, during the period of his tenure the vessel is not merely his place of employment; it is the framework of his existence." [47]

If the social guests of the tenant can hold the landlord to a duty of reasonable care in the maintenance of the building's common stairways and approaches,[48] and if such duty extends even to the social guest of the janitor,[49] *a fortiori*, the authorized guest of a seaman should be entitled to the same degree of protection from the shipowner. "A person may be a business visitor of a lessor of land although he is merely a gratuitous licensee of the lessee." [50]

When Kermarec started to descend the stairway, he had a right to assume that it was safe to do so. It was a common stairway intended to be used by crew, passengers and anyone who was lawfully on the vessel. Whether, in fact, it was safe should be determined by the usual rule of reasonable care without regard to the status of the person injured. If the licensee-invitee classification must be followed, however, it is submitted that petitioner was entitled to the preferred status of invitee, and the Courts below erred in treating him as a licensee.

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[47] *Aguilar* v. *Standard Oil Company, supra*, p. 934.

[48] *Pessagno* v. *Euclid Inv. Co.*, D.C. Cir., 112 F.2d 577; *Klotz* v. *Ganz*, 296 N.Y. 715, 70 N.E.2d 538; *Bowers* v. *City Bank Farmers Trust Co.*, 282 N.Y. 442, 26 N.E.2d 970; *Gilcher* v. *McNulty Bros. Realty Co.*, 295 N.Y. 743.

[49] *Mercier* v. *Bushwick Sav. Bank*, 261 App. Div. 151, 24 N.Y.S. 2d 666, affd. 261 App. Div. 1105, 27 N.Y.S. 2d 1003.

[50] 2 *Restatement of Torts*, § 332, comment h, p. 901; § 360, p. 976.

C. If Petitioner Was a Licensee the Respondent Breached a Duty Due Him. The Evidence Supports the Verdict. It Was Error to Set It Aside.

If clearer evidence were necessary to prove the confusion now rampant in the law of licensee and invitee, and the need for a single standard of care toward all lawful visitors, the instant case provides it.

The Trial Court and the majority of the Court below adopted the classic definition of the duty owed to a licensee, i.e. "the shipowner shall not wilfully or wantonly injure a licensee, or expose him to hidden perils or fail to use due care to prevent injury to him after discovering that he is in danger."[51] Pursuant thereto, two essential issues were presented to the jury: Was there a dangerous condition, and did the shipowner know of it? The jury found in the affirmative, but both Courts disagreed. There was no evidence of a dangerous condition, declared both Courts because "There was no evidence that the tacks were inadequate" or that "they were not suited for the purpose."[52] Probably intending the same conclusion of law, the Trial Court stated: "• • • the question is not whether the defendant should have known of the dangerous condition, if in fact it was dangerous, but whether it actually did know of it."[53] The Majority below put it this way: "• • • this (lack of evidence that tacks were inadequate) was not enough to permit the jury to draw the inference that the defendant should have known that the condition of the stair-

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[51] Majority Opinion, p. 178. Charge to jury (R. 79).

[52] Majority Opinion, p. 178. Memorandum of Trial Court (R. 93).

[53] Memorandum of Trial Court (R. 93).

way presented a condition of danger to Kermarec of which he should have been warned." [54]

It is submitted that on both issues—the dangerous condition and respondent's knowledge thereof—both Courts erred.

As to the first, the question was not solely the size or adequacy of the tacks, but whether, considering the length of the runner, and the heavy traffic on the stairway (R. 56, 61), two carpet tacks, removable by hand alone, and placed only at the front of each tread with nothing to hold the canvas in place at the rear of the step, or against the riser to the step above, were sufficient to keep the canvas from coming loose and slipping off the step under the cumulative weight and repeated jarring of those using the stairway. We may assume that had a sufficient number of tacks been used, the canvas could have been held in place. But the question before the jury was simply whether two tacks alone were enough under the circumstances. To say, therefore, that there was no evidence that the tacks were inadequate for their purpose, in whatever sense the term "adequate" was used, is simply to ignore the evidence and defy reality. The jury unquestionably could find, and did, that a dangerous condition existed on the stairway as Kermarec started to descend.

With respect to the second issue—respondent's knowledge of the dangerous condition—there is no need to enlarge upon Chief Judge Clark's analysis,[55] except to refer to additional authorities.[56]

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[54] Majority Opinion, pp. 178-179.

[55] Dissenting Opinion, pp. 179, 182.

[56] *Negligent Activity of Occupier: Meek* v. *Cordisello*, 266 App. Div. 1044, 44 N.Y.S. 2d 529. Plaintiff, "'an invitee or licensee,' injured by falling tree, partially sawed by defendant's employees

"The opportunities for loose or bulging canvas to trip users of the stairs are so obvious to anyone who has ever mounted a stairway that not surprisingly the jury found Bourdon had actual knowledge of the danger, but was too lazy to remedy it by securing the material properly.

Neither under the erroneous charge which the trial court gave the jury nor under the more favorable in-

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who left the tree before the accident, permitted to recover. *Radio Cab Inc.* v. *Hauser*, C.C.A.D.C. 1942, 128 F.2d 604. Defendant, business invitee of gas station, injured plaintiff, licensee, and invoked owners immunity. Defendant liable. Where "• • • the injury results from negligent acts of the occupier or his servants, the immunity disappears and the liability of the occupier is the same to a licensee as to an invitee." p. 605. The active negligence which imposes liability on the occupier need not occur while the licensee is on the premises. *Masek* v. *Bubenheimer*, 229 Wisc. 194, 281 N.W. 924; *Meek* v. *Corbisello, supra;* see *Atlantic Greyhound Corp.* v. *Newton*, 4 Cir. 1942, 131 Fed. 2d 845. The doctrine of active negligence is said to be an "attempt to remedy a perceived injustice by mitigating the old rule that the property owner was liable to noninvitees only for wilful or wanton injuries." 156 A.L.R. 1226.

Dangerous Condition of Premises: The Blue Moon III, W.D. N.Y. 1932, 60 F.2d 653. Licensee directed aboard vessel by defendant's employee, knowing deck had recently been waxed. Owner liable. "• • • A dangerous condition existed • • • which was within the knowledge of respondent's employee • • •." p. 654. *Gleason* v. *Academy of the Holy Cross*, D.C. Cir., 1948, 168 F.2d 561. Defendant liable to licensee who fell from top step of school balcony. "Dangers that reasonably careful people are likely not to discover are latent or hidden." p. 562. See, also, *Recreation Centre Corp.* v. *Zimmerman*, 172 Md. 309, 191 Atl. 233 (defect in step); *Morrison* v. *Carpenter*, 179 Mich. 207, 146 N.W. 106 (unexpected step down in dark).

Knowledge of Danger Imputed When Knowledge of Condition Known—The Objective Test: The Blue Moon III, supra, p. 654; *Ward* v. *Avery*, 113 Conn. 394, 155 Atl. 502, 503; *Olderman* v. *Bridgeport City Trust Co.*, 125 Conn. 177, 4 Atl. 2d 646, 648. The English law is in accord. *Hawkins* v. *Coulsdon and Purley U. D. Co.* (1953, 2 All. E.R. 364, *aff'd.* 1 All. E.R. 97, 108 (Ct. of App.) (L. J. Romer.); *Pearson* v. *Lambeth Borough Council* (1950), 2 K.B. 353, aff'd. (1950), 1 All. E.R. 682 (Ct. of App.); *Slater* v. *Clay Cross Co. Ltd.* (1956), 3 W.L.R. 232 (Ct. of App.).

structions to which the plaintiff was entitled was it necessary to show that the defendant company (i.e., its top officers) had actual knowledge of the danger: (1) If liability rests on Bourdon's affirmative negligence in improperly tacking the carpet, his employer is vicariously liable without fault of its own on principles of *respondeat superior;* (2) if the fault is the company's failure to repair or warn of a hidden dangerous condition, actual knowledge of the employee who created it may be imputed to the employer because the knowledge concerns a matter as to which the employee acts within the scope of the employment, e.g., 1 Restatement, Agency § 272, comment *a*2 (1933); In re Texas City Disaster Litigation, 5 Cir., 197 F.2d 771, affirmed 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427; Cashin v. Northern Pac. Ry. Co., 96 Mont. 92, 108, 28 P.2d 862, 868;"

One year before the passage of the Occupiers' Liability Act of 1957, Lord Justice Denning, in *Slater* v. *Clay Cross Co. Ltd.* (1956), 3 W.L.R. 232 (Ct. of App.), noted that the modern English cases had effectively obliterated the distinction in the duty owed to an invitee and to a licensee in the instant type of situation where the occupier had, through its servant, actual knowledge of the physical condition. The Lord Justice states:

"The Law Reform Committee has recently recommended that the distinction between invitee and licensee should be abolished; but this result has already been virtually attained by the decisions of the courts. The classic distinction was that the invitor was liable for unusual dangers of which he knew or ought to know, whereas the licensor was only liable for concealed dangers of which he actually knew. This distinction has now been reduced to vanishing point. The

decision of the court in *Hawkins* v. *Coulsdon and Purley Urban Dist. Council;* * * * shows that a licensor, as well as an invitor, is liable for unusual dangers of which he knew or ought to have known. The broken step in that case was not a concealed danger, but it was an unusual danger; the local authority did not know it was a danger, but they ought to have known it; and they were held liable. The duty of the occupier is nowadays simply to take reasonable care to see that the premises are reasonably safe for people lawfully coming on to them; and it makes no difference whether they are invitees or licensees * * * "

At the risk of laboring the point, we respectfully repeat that petitioner should never have become entrapped in the semantic quicksand of whether he was a licensee or invitee. The protracted litigation in this case indicates the need for a single standard of care. But if Kermarec was a licensee, he is nevertheless entitled to his verdict. The fact that this case was tried on two occasions with the first jury unable to agree and the second rendering its verdict for the petitioner, presumptively indicates that there were questions of fact to be determined by the jury. The judges of the Courts below also were unable to agree on their findings of fact. Under such circumstances one cannot say that reasonable men could not have differed and that there was no evidence to justify the verdict.

If the "single question" on this appeal is whether " * * * there was any evidence upon which the jury could have found negligence on the part of the respondent * * * ,"[57] that question here should be answered in the affirmative.

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[57] *Eckenrode* v. *Penn. R. Co.*, 335 U.S. 329, 330, 69 S.Ct. 91, 92; *Rogers* v. *Missouri Pacific Ry. Co.*, 352 U.S. 500, 77 S.Ct. 443, 451; *Palermo* v. *Luckenbach Steamship Co.*, 355 U.S. 18; 78 S.Ct. 1; *Gibson* v. *Thompson*, 355 U.S. 18; 78 S.Ct. 3.

CONCLUSION

The facts having been resolved in favor of the petitioner, even on a charge less favorable than that to which he was entitled, the jury verdict should not have been disturbed and should now be reinstated.

Respectfully submitted,

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APPENDIX

Footnote 37

THE CONFUSION IN THE CASE LAW

A. Distinction Between Invitee and Licensee

1. The friend of a customer in the owner's store.
   a. Invitee—*Briggs* v. *John Yeon Co.*, 168 Ore. 239, 122 P.2d 444 (1942)
   b. Licensee—*Flickenstein* v. *Great Atl. etc. Tea Co.*, 91 N.J.L. 145, 102 Atl. 700 (1917)
2. The child of a customer in the owner's store.
   a. Invitee—*Grogan* v. *O'Keefe's Inc.*, 267 Mass. 189, 166 N.E. 721 (1929)
   b. Licensee—*Petree* v. *Davison-Paxon Stokes Co.*, 30 Ga. App. 490, 118 S.E. 697 (1923)
3. Person entering business establishment for non-related purpose.
   a. Invitee—*Ward* v. *Avery*, 113 Conn. 394, 155 Atl. 502 (1931)
   b. Licensee—*Bird* v. *Clover Leaf-Harris Dairy*, 125 P.2d 797 (Utah S.Ct. 1942)
4. Guest of janitor.
   a. Invitee—*Mercier* v. *Bushwick Sav. Bank*, 261 App. Div. 151, 24 N.Y.S. 2d 666 (2d Dept. 1941)
   b. Licensee—*Barthowski* v. *Schrembs*, 67 N.E. 2d 922 (Ohio App. 1944)
5. Doctor visiting employee in factory.
   a. Invitee—*Jones* v. *Pa. Coal etc. Corp.*, 255 Pa. 339, 99 Atl. 1008 (1917)
   b. Licensee—*Wilson* v. *Goodrich*, 218 Iowa 462, 252 N.W. 142 (1934)

6. Inquiry in reference to vacancy on premises.

   a. Invitee—*Oettinger* v. *Stewart*, 24 Cal. 2d 133, 148 P.2d 19 (1944) (No sign out; placecard indicating "office")
   Fogerty v. *Bogart*, 59 App. Div. 114, 69 N.Y.S. 47 (2d Dept. 1901) ("Flat to Let" sign)

   b. Licensee—*Mills* v. *Heidingsfiled*, 192 So. 786 (La. App. 1939) (No evidence of a general advertisement)

7. Going on premises Seeking employment.

   a. Invitee—*St. Louis R. Co.* v. *Wirbel*, 104 Ark. 236, 149 S.W. 92 (1912) (An industrial plant, no invitation)

   b. Licensee—*Amer. Ry. Express Co.* v. *Gilbreath*, 48 F.2d 809 (C.C.A. 6th Cir. 1931) (No invitation, told to go to back of building to see person in charge of hiring.)

8. The social guest.

   a. Of the Occupier-Licensee—*Roth* v. *Prudential Life Ins. Co. of N.Y.*, 266 App. Div. 872, 42 N.Y.S. 2d 592 (2d Dept. 1943)
   Wilder v. *Ayers*, 2 App. Div. 2d 354, 156 N.Y.S. 2d 85 (1st Dept. 1956) affd. 3 N.Y. 2d 725

   b. Of the tenant—invitee of the occupier-owner. *Bowers* v. *City Bank Farmers Trust Co.*, 282 N.Y. 442 (1940)

   c. Of the host—treated as class in themselves: licensee—*Scheibel* v. *Lipton*, 156 Ohio St. 308, 102 N.E. 2d 453 (1951)

   d. Business acquaintance invited to private home for supper—invitee of host—*Graber* v. *Grant Printing Corp.*, 26 N.Y.S. 2d 990

   e. Implicitly treated as invitee of host—*Bogateroff* v. *Caplan*, 108 N.Y.S. 2d 205 (Sup. Ct. 1951) affd. 279 App. Div. 1357 (1st Dept. 1952)

f. Employee of tenant in two family house—invitee of landlord-owner—*Clapper* v. *Zubres*, 261 App. Div. 850, 24 N.Y.S. 2d 377 (3d Dept. 1941)

9. Policemen and firemen.

a. Licensee—*Pincock* v. *McCoy*, 48 Idaho 227, 281 P. 371 (1929) (Policeman) *Todd* v. *Armour & Co.*, 44 Ga. App. 609, 162 S.E. 394 (1932) (fireman) *McDaniel* v. *The Lisholt*, 155 F. Supp. 619 (S.D.N.Y. 1957), affd. 2 Cir. July 10, 1958, F.2d (fireman)

b. Occupier has duty of reasonable care to make passageways safe (invitee)—*Bredenhender* v. *Midtown Properties Inc.*, 4 App. Div. 2d 276, 164 N.Y.S. 2d 276 (1st Dept. 1957) *Meiers* v. *Fred Koch Brewery*, 229 N.Y. 10 (1920)

c. City fireman invitee when goes out of area to put out fire on request of owner—*Buckeye Cotton Oil Co.* v. *Campagna*, 146 Tenn. 389, 242 S.W. 646 (Sup. Ct. 1922)

B. Divergent Classifications of Licensees

1. Three Categories: Licensee by express invitation; licensee by implied invitation; and, bare licensee—*Chic. Gr. Western Ry. Co.* v. *Beecher*, 150 F.2d 394 (C.C.A. 8th) cert. den. 326 U.S. 781 (Iowa law)

2. Two categories;

a. Licensee by invitation and licensee by permission —*Millspaugh* v. *Northern Indiana Pub. Serv. Co.*, 104 Ind. App. 540, 12 N.E. 2d 396 (1938)

b. Bare licensee and licensee by invitation—*Firfer* v. *United States*, 208 F.2d 524 (D.C. Cir. 1953) (Federal Tort Claims Act)

3. One Category—Gratuitous licensee: any person lawfully on premises, other than a business visitor—*Oettinger* v. *Stewart*, 24 Cal. 2d 133, 136, 148 P.2d 19 (1944)

C. Standard of Care owed to a Licensee.

1. Different standards of care owed to a licensee in New York.

   a. Intentional or wanton injury—*Fox* v. *Warner-Quinlan Asphalt Co.*, 204 N.Y. 240, 245 (1912) (To refrain from "intentional or wanton injury and from setting dangerous devices for the purpose of harming trespassers.") *Mendelowitz* v. *Neisner*, 258 N.Y. 181, 184 (1932) ("Toward mere trespassers or bare licensees the rule is well settled that the only duty owing to them by the owner or occupier of land is to abstain from inflicting intentional, wanton or wilful injuries unless he maintains some hidden engine of destruction • • • ")

   b. Refrain from acts of affirmative negligence—*Paquet* v. *Barker*, 250 App. Div. 771, 293 N.Y.S. 983 (2d Dept. 1937) ("If he was a bare licensee, • • • the appellant owed the duty of refraining from affirmative acts of negligence that might injure the former.") *Byrne* v. *N.Y. Central & H.R. Ry. Co.*, 104 N.Y. 362 (1887) (Active negligence distinguished from mere passive negligence). See, *Constantino* v. *Watson Contracting Co.*, 219 N.Y. 443, 445-446 (1916) (New York law recognizes "a distinction • • • between the consequences of active and passive negligence.")

2. Objective or subjective standard of whether occupier should have known the condition was unreasonably dangerous to a licensee—New York law—

   a. Subjective standard—*Higgins* v. *Mason*, 255 N.Y. 104, 111 (1930) (Action by guests in auto against owner-operator for injuries caused by defective mechanism. "if Mason's failure to realize that the 'something' which was wrong with the automobile constituted a dangerous condition was due to his lack of mechanical knowledge, that was a

risk assumed by the guests when they accepted the invitation to take the trip".)

b. Objective standard—*Ehret* v. *Village of Scarsdale*, 269 N.Y. 198, 207 (1935) ("In this case it is plain that by the exercise of reasonable vigilance, the defendant might have anticipated that gas might leak from a break in the injured gas main at the point where it was encased in the pipe drain * * * .") *Mayer* v. *Temple Properties*, 307 N.Y. 559, 563-64 (1954)

3. Time when affirmative negligence takes place to impose liability on occupier to licensee under New York law.

a. At any time as long as negligence is affirmative or active in nature—*Meek* v. *Corbisello*, 266 App. Div. 1044, 44 N.Y.S. 2d 529 (3d Dept. 1943) app. den. 267 App. Div. 841; *Mayer* v. *Temple Properties*, 307 N.Y. 559 (1954); *Friedman* v. *Berkowitz*, 206 Misc. 889, 136 N.Y.S. 2d 81 (City Ct. 1954)

b. Only while the licensee is on the premises—*Faber* v. *Meiler*, 278 App. Div. 849, 104 N.Y.S. 2d 485 (2d Dept. 1951)

4. Fall down unlighted steps by licensee.

a. Occupier liable—*Gleason* v. *Academy of the Holy Cross*, 168 F.2d 561 (D.C. Cir. 1948) ("Dangers that reasonably careful people are likely not to discover are latent or hidden.")

b. Occupier not liable—*Biggs* v. *Bear*, 320 Ill. App. 597, 51 N.E. 2d 799 (1943)

5. Injury to licensee caused by excavation on occupier's land.

a. Occupier liable—*Morrison* v. *Carpenter*, 179 Mich. 207, 146 N.W. 106 (1914)

b. Occupier not liable—*Porchey* v. *Kelling*, 353 Mo. 1034, 185 S.W. 2d 820 (1945)

6. Injury to licensee caused by obstruction placed on land by defendant-occupier.

   a. Occupier liable—*Masek* v. *Bubenheimer*, 229 Wisc. 194, 281 N.W. 924 (1938) (Top of iron pipe extending above grass)

   b. Occupier not liable—*Mazey* v. *Loveland*, 133 Minn. 210, 158 N.W. 44 (1916) (Wire stretched across lawn)

7. Whether darkness of night, concealing a dangerous condition which otherwise the licensee would have observed, renders the condition a hidden peril so as to make the occupier liable to a licensee?

   a. Occupier liable—*Vaughan* v. *Transit Development Co.*, 222 N.Y. 79, 84 (1917) (dictum)

   b. Occupier not liable—*Reardon* v. *Thompson*, 149 Mass. 267, 21 N.E. 369 (1889)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 22

JOSEPH KERMAREC,

Petitioner,

against

COMPAGNIE GENERALE TRANSATLANTIQUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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Preliminary Statement

This action comes before this Court after the case was tried before Judge Murphy and a jury in the Southern District of New York. There was a verdict for the plaintiff in the sum of $7,500.00. After the trial Murphy, J. in an opinion set aside the verdict and dismissed the complaint. On an appeal, the order and judgment of Judge Murphy was affirmed by a 2 to 1 decision of the Court of Appeals for the Second Circuit. There was a majority opinion by Lumbard, J. and a dissenting opinion by Clark, Ch. J.

The Issue

The issue is whether the Trial Court was correct in having set aside the verdict of the plaintiff and having dismissed the plaintiff's complaint, and whether the Court of Appeals was correct in having affirmed the lower Court.

The Evidence

On November 24, 1948 at about noon, the plaintiff went aboard the defendant's ship, the S. S. OREGON, which was moored at a pier in the North River, for the sole purpose of visiting with a member of the ship's crew, and to deliver to that party a package which the ship's crew member would in turn deliver to a mutual friend in France (R. 8). His call at the ship was purely personal and had nothing to do with the ship itself (R. 8, 18). He met his friend, Henry Yves, at the gate (R. 8). He knew that in order to go aboard the ship that he needed a pass (R. 9). The securement of the pass was by pre-arrangement. Yves acted as agent for the plaintiff in the securement of that pass (R. 9, 17, 19, 47).

After arriving at the vessel, he went up the gangway and to the room of Yves where he and Yves had refreshments (R. 11). At about five o'clock, or about five hours after arriving on the vessel, he was about to leave the ship, and he was in a hurry to do so (R. 10, 11, 15, 16).

In leaving the ship he started down a stairway, consisting of about ten or twelve steps, which steps were covered with white canvas. The canvas was clean, and as he descended "the steps looked all right all the way down." He saw nothing loose (R. 12, 24, 25). The canvas was about one-eighth of an inch thick and the stairway had handrails on each side. (R. 12). He did not attempt to use the gangway on which he had boarded the ship. Yves was at the head of the stairway as the plaintiff started

down (R. 13). He looked at the steps and they appeared all right. He was in a hurry (R. 22). He continued to about the fourth step from the bottom when he claimed that the canvas slipped under his foot, and that he fell to the bottom of the stairway (R. 11, 12). However, he admitted that on the day after the accident he did not know how the accident happened (R. 14, 15). As a matter of fact, in Defendant's Exhibit A—the hospital record—this appears in the history: "He is not quite certain of the manner in which he was injured" (R. 15). He stated that while he was lying at the foot of the stairway, he noticed that the canvas at the fourth step from the bottom was hanging, but that the rest of the canvas was all right (R. 13, 14). The canvas covering the stairway was all in one piece.

Henry Yves and Rene Dufy, the bartender on the ship, came down the stairway immediately after the plaintiff had fallen, but they did not fall (R. 25, 29). Exhibits C and D show how the stairway looked (R. 29).

Exhibit B was the pass used by the plaintiff in order to visit his friend on the vessel (R. 20).

Since this appeal is on an abbreviated record, and not on a reproduction of all the exhibits, the contents of the pass are here quoted:

> "No. 4424, French Line, Compagnie Generale Transatlantique, Pier 88, North River, foot of West 48th Street, visitor's pass, company's copy, to be collected at entrance of pier. Date, 24 November, 1948.
>
> "Admit Mr. Kermerac, Joseph, to visit S.S. Oregon, from 9 a.m. to 5 p.m. only, to visit M. Henry.
>
> "The person accepting this pass, in consideration thereof, assumes all risks of accidents and expressly agrees that the Compagnie Generale Transatlantique shall not be held liable under any circumstances whether by negligence of their employees or otherwise,

for any injury to his person, or for any loss or injury to his property.

"It is issued upon the express condition that it confers no right to enter the pier or ship unless shown whenever required and is subject to such rules and regulations as the Compagnie Generale Transatlantique may make from time to time." (R. 20, 21)

George Bourdon, the ship's steward, had placed the canvas on the stairway, and had fastened the canvas by the use of tacks, with one tack on each side of the canvas on each step with the tacks running through the canvas and through the hard rubber and into the wood, which formed the permanent tread (R. 30, 31, 32, 53, 54, 58, 59). He had used the stairway between the time he placed the canvas on it, and it had looked in order (R. 55).

Thomas Flood, an employee of the defendant, testified that he was a guard stationed at the pier gate, and it was part of his work to pick up the visitors' passes such as the one involved in this accident. The pass was in two parts—one kept by the guard when the visitor arrived, and the other (Exhibit E) turned in by the visitor when leaving the pier is the part originally kept by the visitor, but which was turned in at the pier gate when he left (R. 34, 35).

Henry Yves, a nurse aboard the S. S. Oregon had known the plaintiff for a long time (R. 36, 37). He and the plaintiff had some wine in his room while they were having something to eat, and the plaintiff had also gone to the ship's bar to have something to drink (R. 37, 38, 39). The stairway was covered with canvas, known as sailing cloth (R. 41, 43, 51). At the time that the plaintiff fell, Bourdon and Dufy were standing at the head of the stairway. Every step looked normal and smooth (R. 52). The canvas was fastened (R. 41, 42). Yves walked down the stairway to the place where the plaintiff was lying immediately after

plaintiff's accident, and the entire stairway looked normal and smooth (R. 44).

Rene Dufy, the barman on the vessel, saw the plaintiff fall from about the third or fourth step from the bottom. He went down the stairway to the plaintiff, and the canvas was all right (R. 62, 64). He had also walked up and down that stairway about ten times that day prior to the accident. The canvas did not slip. It was tight and fitted snugly. (R. 62, 68, 69, 70). He had helped Bourdon put the canvas on the stairway. The canvas was nailed to prevent slipping (R. 66). He used the stairway about ten times a day (R. 73, 74).

POINT I

The Trial Court properly set aside the verdict and dismissed the complaint.

A.

In this case the petitioner was a social visitor and not a business visitor on the respondent's ship. This action happened within the jurisdiction of the State of New York. The question of seaworthiness does not exist in this case. The reason for the petitioner being aboard the ship had nothing to do with the operation of the vessel in any respect. The petitioner was aboard the vessel only for a personal reason, and in no respect was he there on business mutual to him and to the ship.

Under the law, seaworthiness of the vessel plays no part in the rights and duties of the parties in this action. As a matter of fact, the Court eliminated the question of seaworthiness from the case.

The action having happened within the jurisdiction of the State of New York, the law of the State of New York applies.

In New York a social visitor, such as the petitioner, may not recover unless the respondent inflicts injury on a social visitor, or licensee by intentional or wanton acts, or by setting in motion dangerous devices, or by creating, after the licensee is on the premises, a dangerous condition by affirmative acts of negligence.

The record is barren of proof that the respondent is chargeable of any conduct permitting a recovery in this case.

The case of *Donohue* v. *Erie Co.*, 258 App. Div. 1, reversed on other grounds in 285 N. Y. 24, held this principle to which the Court of Appeals took no exception. In that case at page 3 the Court said:

> "As to mere licensees the extent of the obligation of the owners or occupiers of land not chargeable with affirmative negligence is to refrain from inflicting upon such licensees intentional or wanton injury and from setting dangerous devices thereon such as spring-guns or like agencies for the purpose of harming trespassers. (Fox v. Warner-Quinlan Asphalt Co., 204 N. Y. 245.)"

Again in the case of *Meiers* v. *Koch Brewery*, 229 N. Y. 10, 13, the Court said:

> "To come under the implied invitation as distinguished from a mere licensee, the visitor must come for a purpose connected with the business in which the occupant is engaged. * * * There must be at least some mutuality of interest in the subject to which the visitor's business relates."

In the case of *Vaughan* v. *Transit Development Co.*, 222 N. Y. 79, at 82, the Court said:

> "If plaintiff had had no permission to come on the premises he would have been a trespasser. If he had been there by invitation or on lawful business of

> interest to both parties he would have been an invitee. But he was there by permission, for his own convenience, and his status was that of a bare licensee. (Heskell v. Auburn L., H. & P. Co., 209 N. Y. 86.) Long-continued acquiescence in such use does not become an invitation. The law does not so penalize good nature or indifference nor does permission ripen into right. (Stevens v. Nichols, 155 Mass. 472.)"

One of the leading cases in New York is the case of *Fox* v. *Warner-Quinlan Asphalt Co.*, 204 N. Y. 240, and cited with approval in the case of *Donohue* v. *Erie Co., supra.* In that case at page 243 the principles governing the situation now before this Court was expressed by the Court of Appeals in this manner:

> "The extent of this obligation was accurately stated and fully considered by Judge Gray in Cusick v. Adams (115 N. Y. 55. See cases therein cited.) The principle is now well settled by repeated adjudications, in this country and in England, that where a person goes upon the premises of another without invitation, but simply as a bare licensee, and the owner of the property, passively, acquiesces in his coming, if an injury is sustained by reason of a mere defect in the premises, the owner is not liable for negligence; for such person has taken all the risk upon himself."

and again at page 245, the Court said:

> "It thus appears that as to mere licensees the extent of the obligation of the owners or occupiers of land not chargeable with affirmative negligence is to refrain from inflicting upon such licensees intentional or wanton injury and from setting dangerous devices thereon such as spring-guns or like agencies for the purpose of harming trespassers. (Weitzmann v. Barber Asphalt Co., 190 N. Y. 452.)"

In the case of *Weitzmann* v. *Barber Asphalt Co.*, 190 N. Y. 452, at page 456, the Court of Appeals again gave expression of the rule of law governing this case:

> "As to such persons the well-settled rule is that the only duty of the owners or occupiers of the land is to abstain from inflicting intentional, wanton or willful injuries. (Magar v. Hammond, 183 N. Y. 387; Downes v. Elmira Bridge Co., 179 *id.* 136; Birch v. City of New York, 190 *id.* 397.)"

In the case of *Mendelowitz* v. *Neisner*, 258 N. Y. 181, at page 184, the Court said:

> "Where a person goes upon the premises of another without invitation, but simply as a bare licensee, and the owner of the property, passively acquiesces in his coming, if an injury is sustained by reason of a mere defect in the premises, the owner is not liable for negligence; for such person has taken all the risk upon himself. Such is the law as expressed in Fox v. Warner-Quinlan Asphalt Co. (204 N. Y. 240, 243) and Sterger v. Van Sicklen (132 N. Y. 499). Toward mere trespassers or bare licensees the rule is well settled that the only duty owing to them by the owner or occupier of land is to abstain from inflicting intentional wanton or willful injuries unless he maintains some hidden engine of destruction, such as spring guns or kindred devices upon his property. (Weitzmann v. Barber Asphalt Co., 190 N. Y. 452; Birch v. City of New York, 190 N. Y. 397.)"

See *Vega* v. *Lange*, 248 App. Div. 521; *Gallagher* v. *Citizens' Water Works*, 278 App. Div. 792, aff'd 303 N. Y. 805.

It might be assumed that a person visiting with the owner of the premises might have right of recovery on the basis of ordinary negligence. Such a party certainly would

have greater rights that one who is merely visiting an employee on the owner's premises, and who is in no way on the premises for any social or business interest of the owner. Yet the cases uniformly hold that except for wanton or willful negligence, or for the maintenance of a trap, or for affirmative negligence created after the arrival on the premises, even one visiting with the owner of the premises may not recover.

The petitioner was a licensee, being only a social visitor. As such he took the premises as he found them, and petitioner cannot recover in the absence of a showing that the respondent maintained a trap, or hidden dangers, upon their premises, and failed to warn petitioner of same (*Dodge* v. *Czarniecki*, 2 N. Y. 2d 897; *Roth* v. *Prudential Life Insurance Company*, 266 App. Div. 872; *Sheingold* v. *Behrens*, 276 App. Div. 973, 275 App. Div. 686, leave to appeal denied 301 N. Y. 816; *Kirkup* v. *Kirkup*, 279 App. Div. 803; *Traub* v. *Liekefet*, 2 A. D. 2d 22; *Wilder* v. *Ayers*, 2 A. D. 2d 354; aff'd 3 N. Y. 2d 725.)

B.

If the question of the petitioner's status is not to be considered on the basis that his rights are controlled by the Law of the State of New York, but that his rights, if any, are to be determined under Maritime law, even then the petitioner has failed to prove an action against the respondent.

Since the status of the petitioner was so definitively stated by Lumbard, J. in the majority opinion (R. 97-100), what Lumbard, J. said, will not here be repeated. Counsel respectfully refers the Court to the opinion of Lumbard, J.

It will be noted in the case of *Gunnarson* v. *Robert Jacob*, 94 F. 2nd 170 (2 Cir. 1938), cert den. 303 U. S. 660 (1938); re-hearing den. 304 U. S. 388, and referred

to by Lumbard, J., the Court was dealing not only with the rights of one who was a licensee aboard the vessel, but also was dealing with the ship's captain and his rights. In that case the right to recover was held to exist so far as the captain was concerned, and it was also held that the captain's son, a licensee, had no rights other than the rights of a licensee.

J. Learned Hand, stated the law as follows:

> "The doctrine is well settled; the relation with its resulting duty arises only when the person who enters the premises does so in the interest of the owner, *or upon some business of his own, of which the owner has notice and to an entry in pursuant of which he consents, directly or indirectly*" p. 171. (Emphasis added.)

In that case the captain's son had, previous to the time of his accident, assisted his father in certain work aboard the vessel. The relationship of the petitioner to the respondent in the present case is much more distant than it was in the case just cited.

In the case of *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, the plaintiff was a carpenter doing work in connection which the loading of the vessel. It was said by Mr. Justice Black that he was "on the ship to enable it to complete its loading for safer transportation of its cargo by water" (409).

In the instant case, the petitioner was aboard the vessel for his own purpose and in no way was there for the furtherance of respondent's business.

Recognizing that the rights of people in different categories aboard a vessel are different, this Court as well as in other cases, recognized the difference in status and rights when in *Pope and Talbot, Inc.* v. *Hawn, supra*, and

in applying the principle of *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, expressed the law as follows:

> "Sieracki's legal protection was not based on the term 'stevedore', *but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness*" (413). (italics ours)

It would seem that no other conclusion can be drawn from the language used by this Court than that different people in different relationships aboard a vessel have different rights.

While in the opinion of Clark, Ch. J. there was sought to be drawn an analogy between the petitioner and a seaman, there can it truth be no such analogy. In several of the cases cited by Clark, C. J., as to the rights relating to maintenance and cure, it is fundamental that a seaman is entitled to maintenance and cure, and it is likewise fundamental in our law that a longshoreman or other in such a relationship is not entitled to maintenance and cure. The petitioner stands in neither the relationship of a seaman or a longshoreman.

Recognizing that there are distinctions between the rights of a crew member and a longshoreman, this Court said in *Pope and Talbot, Inc.* v. *Hawn, supra*, "having no contract of employment with the shipowner, he (Hawn) was not entitled to maintenance and cure" (413).

The case of *The Osceola*, 189, U. S. 158, decided in 1903, held that a crew member had the right to recover for unseaworthiness, but denied the right of recovery against the shipowner for negligence.

It seems apparent therefore, that the reasoning of Lumbard, J. is sound and applies to the facts before this Court.

In this case, prior to the trial, counsel for the petitioner stipulated that the issues to be tried concerning the respondent's liability were as follows:

"(b) Was the defendant, its agents, servants and employees negligent?

"(c) Was the plaintiff guilty of contributory negligence? If so, to what extent?

"(d) Is the defendant relieved of liability under the terms of the pass under which the plaintiff boarded the vessel."

In view of the stipulation of counsel at pre-trial, and in view of the failure of petitioner's counsel to have excepted to the Court's charge, the charge as given should not be subject to attack at this time. Negligence was the issue and not seaworthiness.

POINT II

There was no issue which should have been submitted to the jury.

Counsel for the respondent not only does not dispute that every favorable inference should be drawn in behalf of the petitioner, but also that if a question of fact exists, that the case should have been left for the jury's verdict. However no Court, so far as counsel can ascertain, has ever held that merely because an accident happens, the plaintiff presents a jury question.

Were the petitioner's argument to be excepted, every case tried in every District Court would require submission of the case to the jury.

Were the argument to be accepted it would mean that regardless of the legal principles, so long maintained, of the right of a party to recover or the lack of right of recovery

be discarded and the jury would be permitted to speculate on the rights and duties of the parties regardless of the facts. Were the argument to be carried to its ultimate conclusion, even in a criminal case, every case would have to be submitted to a jury. No indictment could be dismissed on trial. Certainly no such thought has been expressed by any Court so far as counsel can determine.

Not only was there evidence coming from the respondent's witnesses that the canvas had been secured by tacks on each side of the canvas on each step, and that before and immediately thereafter the accident, the canvas appeared to be normal and in proper condition, and also that the stairway had been used by one of the witnesses at least ten times on the day of the accident and had been used by other crew members, and that two of the witnesses in descending the stairway immediately after the accident were in no way impeded in their descent and ascent of the stairway, but also the petitioner himself stated that prior to his fall, in looking at the stairway, it appeared to be in proper condition.

There was no evidence that the method of securing the canvas to the stairway was in any way improper.

In the light of the facts in this case, the case should not have been submitted to the jury in the first instance. However, the trial Court, realizing that there was nothing in the record warranting a recovery, was fully justified in setting aside the verdict and dismissing the complaint.

Judge Lumbard speaking for the majority in this case said:

> "In the instant case Kermerac argued that the defendant had breached its duty in failing to notify him that a dangerous condition existed on the stairs. There was no evidence to show that the defendant knew that the stairs were in a dangerous condition.

On the contrary, there was testimony of crew members that the stairs had been used without mishap throughout the day both before and after the accident and that they had noticed nothing unusual.

"The plaintiff, however, maintains that the necessary knowledge could be imputed to the defendant because the tacks used by its servants were clearly inadequate for that purpose. There was no evidence that the tacks were inadeqate. The plaintiff's argument derives solely from a scale drawing of a tack which drawing was in evidence. Standing alone, and in the light of all the surrounding circumstances, this was not enough to permit the jury to draw the inference that the defendant should have known that the condition of the stairway presented a condition of danger to Kermaree of which he should have been warned." (R. 100)

POINT III

The complaint should have been dismissed by reason of the fact that the petitioner had released the respondent of any claim of injury when he accepted the benefits of the pass.

The Court of Appeals found it unnecessary to pass upon the validity of the disclaimer of the liability clause contained in the pass, and it refrained from doing so (R. 100).

Since the Court of Appeals found it unnecessary to decide that issue, counsel will only briefly refer to the pass in the following manner:

The petitioner in this instance was on the respondent's property only by reason of a pass, which was secured by his friend and in behalf of the petitioner. That friend was acting as agent for the petitioner and not for the respondent. The conduct of the petitioner's friend thus became

the conduct of the petitioner and the petitioner is bound by his friend's conduct in relation to the pass.

The case of *Wilder* v. *Pennsylvania R.R.* Co., 245 N. Y. 36, upholds the legal proposition that in accepting the gratuity of a visit from the defendant the plaintiff exonerated the defendant of any possible claims for injury. At page 41 of that case the Court used this language in denying the right of recovery.

> "While using this pass, therefore, she assumed all risks of personal injury."

This case was cited with approval in *Armieri* v. *St. Joseph's Hospital*, 159 Misc. 563, at 564.

See also:

> *Hodge* v. *Rutland R.R. Co.*, 122 App. Div. 142, aff'd 194 N. Y. 570.

POINT IV

Had the verdict not been set aside, the verdict would have been improper because of errors in the Court's charge and refusal to charge.

It will be noted that an exception was taken by counsel for the respondent as follows:

> "Mr. Garvey: I don't remember the exact phraseology, Judge. You gave it in the alternative or paraphrased it when you said that if there is an unreasonable danger existing and the defendant believes that the plaintiff would not discover it, then the jury might find that the defendant was negligent; or, in other words, as you put it, I think if the defendant knew of the dangerous condition and failed to warn the plaintiff. As to that I respectfully except.

"And I don't think you defined negligence, as to what negligence is, Judge.

"The Court: I think I did. I told them about the unreasonable risk—

"Mr. Garvey: And reasonable care?

"The Court: I think I used the words 'reasonable care' too.

"Mr. Garvey: I don't recall it. Other than the exception to the failure to charge pursuant to the requests, I have no other exceptions."

The defendant had made the following requests:

1. The plaintiff was a licensee and the defendant owed him the duty only of refraining from affirmatively doing something in a negligent manner which was the proximate cause of the plaintiff's injuries.
2. The defendant can be liable here only if it was wantonly at fault and that fault was the cause of the plaintiff's injuries.
3. By accepting the pass for admission to the vessel the plaintiff bound himself by the conditions expressed on the pass.
4. Henry was the plaintiff's agent for the purpose of securing the pass and the plaintiff is bound by Henry's conduct in respect thereto.
5. By accepting the pass the plaintiff released the defendant of responsibility for this accident.
6. If the plaintiff was negligent even in the slightest degree he cannot recover in this case.

Request "1" was granted only in part. It should have been granted in full.

Request "3" was granted only as covered in the charge. It should have been granted in full.

Requests "2", "4", "5" and "6" were denied in all respects. The defendant was entitled to have had those requests granted.

CONCLUSION

The dismissal of the complaint after setting aside the jury's verdict was proper, and the order appealed from should be affirmed.

Respectfully submitted,

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GEORGE A. GARVEY,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1958

No. 22

JOSEPH KERMAREC,

Petitioner,

against

COMPAGNIE GENERALE TRANSATLANTIQUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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MALCOLM B. ROSOW,
of Counsel.

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REPLY BRIEF FOR PETITIONER

Respondent's brief studiously avoids the basic issues raised by the petitioner. It requires, however, two brief comments:

1. Petitioner Never Waived or Abandoned the Issue of Unseaworthiness.

The complaint alleges that the vessel was unseaworthy (R. 3-4). The pretrial order of April 16, 1953,[1] referred to by respondent (Resp. Br. p. 12), specifically provides that no issue raised by the pleadings is abandoned. The order antedated *Pope & Talbott, Inc.* v. *Hawn*, 346 U. S.

[1] Official Record on file with Clerk (hereinafter referred to as Off. Rec.), pages 315-317.

706, 74 S. Ct. 202 (Dec. 1953) by several months. The late H. W. Goddard, U. S. D. J. who presided at the pretrial conference was then of the opinion that the doctrine was limited only to seamen and longshoremen and did not consider unseaworthiness a real issue in the case.

At the trial, petitioner formally moved to include unseaworthiness as an issue to be submitted to the jury. This was denied by the Court, "as a matter of law."[2] Plaintiff's "Requests to Charge" again raised the issue. It was again denied.[3]

2. The Jury Found That the Disclaimer of Liability in the Pass Was Not Binding on Petitioner. In Any Event, it Contravenes Public Policy, 46 U. S. C. § 183c.

The evidence is undisputed that Yves obtained and retained the pass, and that it was never shown, read or explained to Kermarec (R. 19-20, 47-48).

The Court charged the jury: "Unless you find that the terms of this language was brought home to the plaintiff and that those express terms applied to any particular alleged negligence of the defendant, then you may not find that the pass is binding on the plaintiff" (R. 80). Implicit in the jury's verdict for the plaintiff is the finding of fact

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[2] R. 33. "Mr. Rosow: "May I, before Mr. Garvey makes his motion, may I at this time, your Honor, make a motion to amend the pretrial order so as to include the cause of action for unseaworthiness of the vessel as it relates to this plaintiff.

The Court: I think it is too late to do this at this time. The pretrial order, as I look at it, is dated in 1953 but I do not deny it on the ground that you are late or that there is laches but I will deny it as a matter of law."

[3] Off. Rec., p. 337, Plaintiff's Requests to Charge, Nos. 22, 23.

"Mr. Rosow: I believe we have an automatic exception to these requests—

The Court: You have them anyway. I will put it this way. You have an exception to all the requests that I have not given or that I have denied." (R. 83).

that petitioner was not informed of the disclaimer and that it, therefore, was not binding upon him.

Apart from the question of fact relating to the pass, it is submitted that the disclaimer of liability contravenes the public policy of the United States as set forth in 46 U. S. C. § 183c,[4] and is unenforceable. *Moore* v. *American Scantic Line, Inc.*, 2 Cir. 1944, 121 F. (2d) 767; see dis. op., *Kermarec* v. *Compagnie Generale Transatlantique*, 2 Cir. 245 F. (2d) 175, 183. See also, *Rosenthal* v. *Compagnie Generale Transatlantique*, S. D. N. Y. 1953, 14 R. F. D. 33, 36.

Respectfully submitted,

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MALCOLM B. ROSOW,
of Counsel.

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[4] 46 U. S. C. § 183c. *Stipulations limiting liability for negligence invalid*

"It shall be unlawful for the manager, agent, master, or owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner, master, or agent from liability, or from liability beyond any stipulated amount, for such loss or injury, or (2) purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss or injury, or the measure of damages therefor. All such provisions or limitations contained in any such rule, regulation, contract, or agreement are declared to be against public policy and shall be null and void and of no effect." R. S. § 4283B, as added June 5, 1936, c. 521, § 2, 49 Stat. 1480.